SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 95

VICTOR LINKLETTER, PETITIONER,

vs.

VICTOR G. WALKER, WARDEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1

1 **Pauper Case**

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Miscellaneous No. 648

STATE OF LOUISIANA, EX REL VICTOR LINKLETTER

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY AND THE STATE OF LOUISIANA

BASIS OF ACTION: Petitioner claims to be illegally confined at State Penitentiary at Angola

For Plaintiff: In Person Requests the Court to appoint Counsel without cost to him.

For Defendant: Jack P. F. Gremillion, Attorney General, State of Louisiana

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2 **Docket Entries**

7/10/62—Filing Petition for Writ of Habeas Corpus—1-25 1

7/31/62—Filing ORDER TO SHOW CAUSE why Writ of Habeas Corpus should not be issued as petitioned by Plaintiff. Issuing notice 8/6/62. Ent. 8/6/62 Hearing 9/7/62 EGW.—26 2

9/ 7/62—Flg. ME—ORDER EGW that hearing on order to show cause why a writ of Habeas Corpus should not issue CONTINUED to 9/21/62, Court requesting Attorney-General's office to file a copy of the transcript of the State Court's proceedings in the record. Issuing notice 9/17/62 and ent. 9/17/62—27 3

9/21/62—Flg. Minute Entry of hearing—written motion to dismiss filed by the State, and IT IS ORDERED that defendant file memorandum within ten days, at which time the matter will be considered submitted. Issuing notice and ent. 9/24/62—28 4

10/ 8/62—Flg. Minute Entry—ORDERED that the time for filing a memorandum in this matter is extended to October 22, 1962. Issuing notice and ent. 10/11/62—32 5

11/ 6/62—Flg. petitioners brief in support of habeas corpus application and in answer to respondent's motion to dismiss.—33-99 x

11/13/62—Flg. Minute Entry—ORDERED that motion to dismiss filed by respondents is GRANTED, and the petitioner's application for the issuance of a writ of habeas corpus is DENIED. Issuing notice 11/14/62 and ent. 11/15/62—100 6

9/20/62—Filing Motion of Defdt. to Dismiss—29-31 4-A

11/27/62—Flg. motion of petitioner for leave to prosecute appeal in forma pauperis and ORDER EGW GRANTING same. FURTHER ORDERED that records be prepared at the expense of the U. S. Government. Issuring notice 11/29/62—101-102 7

11/27/62—Flg. notice of petitioner to appeal to Fifth Circuit Court of Appeals.—103-108 8

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(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Miscellaneous No. 648

STATE OF LOUISIANA, EX REL VICTOR LINKLETTER, *Petitioner*,

v.

VICTOR G. WALKER, WARDEN, *Defendant*.
Louisiana State Penitentiary, Angola, Louisiana and
The State of Louisiana

Petition for a Writ of Habeas Corpus—Filed July 10, 1962

To the Honorable, the Judges of the United States District Court, Eastern District of Louisiana, Baton Rouge Division, The Honorables, The Presiding Judges:

MAY IT PLEASE THE COURT:

Your petitioner, Victor Linkletter . . . of . . . Angola, in the Parish of West Feliciana, State of Louisiana . . . a

citizen of the United States and of the State of Louisiana . . . who is . . . petitioner . . . in the above entitled cause and to be known hereafter herein as Petitioner, . . . complaining . . . shows . . . that . . . he is . . . detained and imprisoned in the . . . LOUISIANA STATE PENITENTIARY . . . at . . . Angola, Louisiana, by the above named defendant, after denial to Petitioner of the . . . protection and guarantee . . . under rights afforded under Article one (1), Sections seven (7) and eleven (11) . . ., of the Louisiana Constitution of 1921 . . ., and further in violation of "Due process Of Law" . . ., of the Fourteenth (14) Amendment . . . to the United States Constitution . . ., and after violation of Petitioner's . . . inherent rights under Amendments four (4) and Five (5) of the "Bill of Rights" of the United State Constitution.

Your Petitioner, is now being illegally confined and restrained . . . of his liberty . . . by one charge of . . . Simple Burglary . . . a charge which Petitioner contends he is not guilty . . . which is by virtue of the following, to-wit:

> Under date of September 18, 1958, a Bill of Information No. 161-524, was filed by the Assistant District Attorney Richard McBride, Jr., in Division "E" of the Criminal District Court in the Parish of Orleans, Louisiana.
>
> This Bill was filed against Victor Linkletter, Joseph La Caze, John H. Soldani and Ruth Morrisson. The Information in question charged the said persons with a violation of R S 14 : 62, in that they did commit simple burglary of the building located at 134 Ca-
> 4 rondelet Street, in the City of New Orleans, Louisiana, the property of one Lawrence Federico, with the attempt to commit a theft therein, on August 16, 1958.

WHEREAS, Petitioner respectfully urges this Honorable Court to examine this petition to the end of granting to Petitioner such relief as is consonant with the facts and the Law submitted herein and in accordance with the fundamental "Law of the Land" and leading rulings and decisions of Courts of review.

Statement of Jurisdiction

The basis of the jurisdiction of the Honorable United States District Court, Eastern District of Louisiana (Baton Rouge Division), is predicated on Title 28, U.S.C.A. 2254.

Petitioner filed an original petition for a Writ of Habeas Corpus in the 20th Judicial District Court, Parish of West Feliciana, St. Francisville, La., with the Honorable John R. Rarick, Presiding Judge. The petition was docketed under #2711, a hearing was held at said Court on December 8, 1961. The action was dismissed without considering or adjudicating the merits of the petition.

On December 16, 1961, Petitioner sent a notice of intention to appeal to the 20th Judicial District Court and to all parties made respondents.

On January 5, 1962, Petitioner sent an application for a Writ of Certiorari and a petition for a Writ of Habeas Corpus to the Honorable Supreme Court of Louisiana. This petition was docketed under #45,966 on January 9, 1962. On January 15, 1962 the petition was denied.

On January 19, 1962, Petitioner filed an application for rehearing in the Supreme Court of Louisiana and on February 2, 1962, Petitioner's application for rehearing was denied.

On March 9, 1962, Petitioner filed a petition for a Writ of Certiorari in the Honorable United States Supreme Court, which was docketed under #1134 Misc., October Term, 1961.

On June 18, 1962, The Honorable Supreme Court of the United States denied Petitioner's application for a Writ of Certiorari, the original letters of this denial is attached to this petition.

The Constitutional questions that are being raised by Petitioner in this petition were all contained in each and every previous petitions mentioned herein in this petition.

Notice To the Honorable Court:

Petitioner has previously filed the following two (2) petitions for a Writ of Habeas Corpus in the Federal District Court, New Orleans Division. Petition #1049 was denied on April 7, 1960. Petition #18

Sundry was denied on July 21, 1961. Both denials were by the Honorable Herbert W. Christenberry.

Statement of Facts

The records of the New Orleans Police Department, 2700 Tulane Avenue, New Orleans, La. will reflect under #NOPD 59776, that petitioner was arrested under date of September 12, 1958 and that Petitioner was charged then with a violation of R S 14 : 62 relative to Simple Burglary of 134 Carondelet Street, New Orleans, La., which is the charge that Petitioner now stands convicted of and is now serving 9 years at hard labor.

The above mentioned arrest #59776, occured at 4516 Magazine Street, New Orleans, La., which was the business establishment known as the Crescent City Novelty Shop, which was a business that was owned partly by Petitioner. At the time of this arrest Petitioner was arrested with Ruth Morrison, only, and both were taken to the First District Police station and booked with the crime of this cause. The arresting officers did not have a warrant for arrest, nor as a matter of fact, even inform Petitioner that he was under arrest until arrival at the first district station. The two arresting officers are unknown to your Petitioner and neither of them appeared as witnesses during the trial of this cause #161-524. The crime charged was alleged to have taken place on August 16, 1958. After several hours of detention at the police precinct, both Petitioner and Ruth Morrison were remanded to the Orleans Parish Prison, 531 S. Broad Street, New Orleans, La.

However, previous to the above mentioned arrest #59776, Petitioner was arrested with one Joseph La Caze on Sunday August 24, 1958, about 1:30 P.M. On this date Petitioner and La Caze were observed by various detectives going to and from certain premises 719 Common Street, New Orleans, La While under observation by these members of the New Orleans Police Dept., Petitioner and La Caze were seen carrying certain equipment to the building at 719 Common Street from a parked automobile. Upon leaving said building Petitioner and La Caze were then arrested by two detectives. Petitioner was not in the commission of any crime at the time of this arrest. Immediately after this arrest, Petitioner and La Caze were

taken to the corner of St. Charles and Common Sts., where several other police officers were waiting. Petitioner and La Caze were then placed in a parked police auto-
6 mobile and held prisoner there for almost two hours. During this period of detention, some of the police went to the premises 719 Common Street and conducted a search therein without a search warrant, they had entered this building with a duplicate key that they had made at a previous date, which they had used previously in order to search this same premises, 719 Common Street. After the two hour detention in the parked police auto, Petitioner and La Caze were taken back to the 719 Common Street building an on up to the third floor of this building. Other police were already there and without the permission of the said lawful occupant, Joseph La Caze.

Petitioner was then searched without warrant, and over his protest, the police seized a set of keys from Petitioner's pockets, one of which was for the 719 Common Street premises. The set of keys were kept by the police and were later used by the State as evidence against Petitioner at trial of this cause, #161-524, and Petitioner was prejudiced thereby. Petitioner's attention was then directed to a mass of equipment which consisted of burning tanks, ladders, paint, guns, hammers, etc, etc. . . . which the police said was burglary equipment. The District Attorney at trial of this cause, claimed that this equipment was under Petitioner's control and used some of it as evidence. After being held in the 719 Common Street premises for about one hour, a police photographer arrived and took pictures of Petitioner and La Caze and photos were taken of the various equipment. Then Petitioner and La Caze were taken to the Police District No. 1, and was then booked with four charges involving New Orleans burglaries, which were:

1. Aggravated Burglary, 719 Common Street, New Orleans

2. Simple Burglary, Variety Stag Bar, 134 Carondelet Street

3. Attempted Burglary, Kolb's Restaurant, 125 St. Charles St.

4. Simple Burglary, Siler's Book Store, 130 Carondelet St.

After leaving the 719 Common Street premises and while Petitioner was being booked with the above mentioned charges at the police precinct, other police officers went to the home of Petitioner, 930 Poydras Street, New Orleans, La. On arrival they found Ruth Morrison there, who was the occupant of the moment. At the command of the police, Ruth Morrison opened the apartment door and after the police had harrassed her, they ransacked Petitioner's home without warrant, and seized many articles which were not stolen, but were the personal papers and property of Petitioner. Some of the seized articles were used as evidence by the State against Petitioner at trial of this cause, #161-524. When the police left Petitioner's home with his personal belongings, they also arrested Ruth Morrison and booked her with the same four above listed charges that the police had placed against Petitioner.

The seized articles that were used as evidence against Petitioner during the trial of this cause #161-524 which were taken from Petitioner's home on August 24, 1958, were as following:

7

	Marked
One left shoe	S-34
One right shoe	S-35
One traffic summons	S-26
One screwdriver	S-41
One card with phone numbers and addresses	S-32

On August 25, 1958, Petitioner was taken from the First District Police Jail to his home, 930 Poydras Street, New Orleans, La. The police then conducted a search of the premises without warrant and over Petitioner's protest, seized several cans of paint, two of which were later to be used as evidence at trial of this cause #161-524, the cans of paint were as follows:

Two cans of Paint marked S-42 and S-43

On August 25, 1958, Petitioner was taken from the police precinct for a second time. This time Petitioner was taken to the Crescent City Novelty Shop at 4516 Magazine Street, New Orleans, La., where a search of the premises was made by police without warrant and the police seized several cans of paint over Petitioner's protest. The above mentioned business was owned partly by Petitioner. The State attempted to use the seized paint as evidence at trial of this cause, but the Court rejected this as not being relevant evidence. However, there were police that had made a search of this business establishment, without warrant on Sunday August 24, 1958, and during the trial of Petitioner, the searching police were permitted to reveal as evidence, by oral testimony, as to what they saw at the business establishment during their search of that place.

After three days detention at Police District No. 1, Petitioner's Attorney came and informed him that the District Attorney had rejected a police request for affidavit on all four charges that Petitioner and La Caze were booked with on August 24, 1958. The police continued to hold Petitioner for two more days when the District Attorney filed an Information on a Conspiracy count, which was a new and different charge than any of the four original bookings, which is not the crime which Petitioner now stands convicted of, nor has anyone ever been brought to trial on this conspiracy charge, which is now almost four years old.

Petitioner was eventually taken to the Orleans Parish Prison and was later released on bond on the Conspiracy charge Information #161-357.

Then on September 12, 1958. Petitioner was re-arrested (NOPD #59776) and re-booked with one of the original rejected charges, which was, simple burglary of the Variety Stag Bar, 134 Carondelet Street, New Orleans. Which is the charge of this cause which Petitioner now stands convicted of, which crime was to have taken place on August 16, 1958.

8 Petitioner was then held by the Orleans Parish Criminal Sheriff at the Orleans Parish Prison in lieu of $35,000 Bond, which was for two charges.

1. Conspiracy to burglarize Kolb's Restaurant, 125 St. Charles Street, New Orleans, La.

2. Simple burglary of Variety Stag Bar, 134 Carondelet Street, New Orleans, La.

The Conspiracy charge was alloted to Criminal District Court Section "H" #161-357, and the simple burglary charge was alloted to Criminal District Court Section "E", #161-524.

A preliminary hearing was granted by the Court in Section "H" on the Conspiracy count. During this hearing on October 10 and 14, 1958, the State Prosecutor presented to the Court all of the evidence that was seized through the various searches as described herein along with ten State witnesses who gave oral testimony. All but one testifing witness were to re-appear later for the State as witnesses against Petitioner at trial of this cause, #161-524. After this preliminary hearing, the Court ordered John H. Soldani and Ruth Morrison to be discharged, and for Petitioner to stand trial with Joseph La Caze.

At a subsequent date following some nine months delay, with no request by Petitioner for any continuances, Petitioner was called up for trial of this cause.

The District Attorney for the Parish of Orleans, asked for and was granted a separation for Joseph La Caze and Ruth Morrison, and the State went to trial with respect to Petitioner and John H. Soldani, only.

Under date of May 28, 1959, Petitioner and John H. Soldani, were found guilty as charged by the jury. Certain Bills were taken to the rulings of the Court during the trial and in addition, a motion and supplemental motion for a new trial was filed on behalf of Petitioner and John H. Soldani on October 13, 1959.

On October 13, 1959, Petitioner and Soldani were sentenced to imprisonment in the State Penitentiary at hard labor for nine years, and on October 19, 1959, a motion for a suspensive appeal was filed in Section "E" Criminal District Court, to the Honorable Supreme Court of Louisiana.

On February 15, 1960, judgment was affirmed by the State Supreme Court as to Petitioner, and was reversed as to the co-defendant, John H. Soldani, ordering the latter discharged.

Petitioner's application for a rehearing was denied summarily on March 21, 1960.

On July 7, 1960, Petitioner was delivered to the Louisiana State Penitentiary, at which time Petitioner started to serve the nine year sentence.

Now If It Please The Court, this petition for a Writ of Habeas Corpus flows from the judgment and rulings of the aforestated matters in this petition, arrived at by an illegal arrest, verdict, and trial Courts erroneous and illegal acts, to constitute within even the narrowest latitudes a denial of "Due Process of Law" under the Fourteenth Amendment to the United States Constitution and violations afforded Petitioner under the Constitution of Louisiana of 1921.

ALLEGATIONS AND CONTENTIONS

I

Petitioner was originally arrested on August 24, 1958, without warrant and was booked with simple burglary of the premises 134 Carondelet Street, New Orleans, which crime was to have occurred on August 16, 1958, and is the charge petitioner now stands convicted.

Petitioner's whereabouts were known to members of the New Orleans Police Department for two days prior to his arrest.

When arrested, police did not give petitioner any reason for making the arrest, either on August 24, or on September 12, 1958.

Immediately after petitioner's arrest on August 24, he was taken to, and placed in a parked police auto for almost two hours, then taken into a building No. 719 Common Street, New Orleans and held there for about one more hour, then taken to the First District Station and booked with crime of this cause.

When petitioner was taken back into the 719 Common Street building a search and seizure without warrant was conducted against the person of petitioner. This search and seizure had been against petitioner's will and he had protested this police action at the time of this search and seizure. A set of keys were taken from petitioner's pockets and were later used as evidence against him during trial of this cause, the keys were marked;

Key ring and five keys marked P. G. - S - 27

The police at the time of search of petitioner were committing an illegal act of trespassing of the premises 719 Common Street, New Orleans. They had no search warrant to permit them to go into this building, the building was entered by police with a duplicate key they had made at a previous date and police admit having entered this same building and searched it before, on or about August 20, 1958.

The police gathered up various equipment, which they termed as "burglary equipment" from this building—719 Common Street, New Orleans and later this equipment was used as evidence at petitioner's trial of this cause. The District Attorney claimed this equipment was under petitioner's control. The fact was established during the trial that Joseph LaCaze, who was the other person arrested with petitioner, was the lawful occupant of the 719
10 Common Street building. Petitioner neither leased this property or owned any of the seized equipment and therefore does not claim that he has the right to include the search and seizure, without warrant, for his benefit, however, since the other party whom it was claimed during Petitioner's trial was the leasor of said property and he (Joseph LaCaze) was not on trial with petitioner, it was impossible for Petitioner to explain in necessary detail the purpose of the various seized equipment from the 719 Common Street building. However, Petitioner would like to point out the fact that never at any stage during the entire trial, was the State able to show that the equipment which could have been used to commit the alleged crime as charged was ever actually used by Petitioner for that particular purpose, or in Petitioner's possession on August 16, 1958, the date the alleged crime was to have occurred. Here Petitioner would like to reserve any rights which may be afforded on the States use as evidence of this seized equipment from the premises 719 Common Street; as far as violations of Petitioner's Federal Constitutional rights are concerned.

After three days detention at police precinct No. 1, the police went to the District Attorney with everything they had seized, although petitioner had been booked on August 24, 1958, with four charges involving New Orleans bur-

glaries, *the District Attorney refused to accept all charges.*

After five days detention the District Attorney accepted a new and different charge, which is not the charge of this cause, neither petitioner, or anyone else has ever been called for trial on this other charge which is now more than three years old. (No. 161-357)

It was almost three weeks later after the original August 24, 1958, arrest that petitioner was re-arrested and charged for a second time with crime of this cause, which was on September 12, 1958.

The main complaint of petitioner in paragraph one (1). of these allegations and contentions is the search of "Petitioner's person" and the seizure of the set of keys marked S-27, from the pockets of petitioner which were used as evidence by the State during trial of this cause. Petitioner contends too, that his arrest was based on the "mere belief that he was guilty of a crime" and that such belief had no foundation, since the District Attorney refused all charges when presented to him that Petitioner had been booked with on August 24, 1958.

11 The Court is respectfully asked at this time to read the following excerpts from case #161-524, the trial case of this cause, Tr. 184, 185. Pertaining to the arrest, search and seizure of the person of Petitioner.

Direct Examination,
POLICE MAJOR, WILLIAM J. McNAMARA:

Q. Do you know where Gustafson and Viguirie did in fact arrest LaCaze and Linkletter?

A. Yes, sir, they did.

Q. Did they bring them back in your company?

A. Brought them back to 719 Common Street at my direction.

Q. Where were you?

A. On the third floor of the building 718 Common Street.

Q. How did you get in this building?

A. With a duplicate key we had made when Viguirie and Vogt visited it previously.

Q. Did you make any search of Linkletter or take anything off his person? I mean at that particular time?

A. There were some keys on a chain that were taken. I don't remember whether I took them or somebody else.

* * * *

OFFICER LAWRENCE VIGUIRIE, who was the officer that arrested Petitioner on August 24, 1958, and who appeared as a witness for the State in case #61-357 at a preliminary hearing held in Section "H" on October 14, 1958, said the following:

Direct Examination, Tr. 3

By Mr. Hertz

Q. What about Sunday August 24?

A. Yes, sir, we did.

Q. What did you see and what did you see, if anyone?

A. We saw Jack LaCaze and Vic Linkletter go to a blue car which was parked in front of the building, a Ford, and from the trunk, they took objects out of the trunk, brought it up to the building, they went into the building, closed the door behind them, stayed there for approximately an hour and they came out. They walked on Common Street towards St. Charles Avenue.

Q. What time was this?

A. I would say it was about two O'clock in the neighborhood of 2:00, 2:10.

Q. Did you see them later on or anyone else later on?

A. Saw them when they came out of the building.

Q. Who was this you saw now?

A. Jake La Caze and Vic Linkletter.

Q. Did you see a third man?

A. Yes, sir, I did. The third man got into the automobile, into the Ford, and drove off, drove towards Carondelet Street on Common.

Q. Are you able to identify that third man?

A. Not positively, no, sir.

Page #4 Continued

By Mr. Hertz

Q. What happened next, if anything?

A. When La Caze and Linkletter came out of the building, I was in room 466 in the St. Charles Hotel

with other officers and I received instructions, Paul Gustafson and myself. . . .

By Mr. Braniff: We object to that as being hearsay evidence.

By The Court: Objection Sustained.

12 Examination Resumed By Mr. Hertz:

Q. What did you do, Officer?

A. We arrested La Caze and Linkletter.

Q. What did you do next, if anything?

A. Brought them back to the—in front of the St. Charles Hotel.

Q. What else happened, if anything?

A. They were later brought to 719 Common Street.

Q. What else did you do?

A. After we returned to 719 Common Street, Captain Stevens, Sergeant La Blanc and myself brought them to the First District and booked them.

Cross Examination Page 10 and 11
By Mr. Zelden

Q. You then stated on Sunday, somewhere between 2:00 and 2:10 you saw Jack LaCaze and Linkletter take some objects out of the trunk and walk into the building?

A. Yes, sir.

Q. Could you see what they carried?

A. Sure two-objects wrapped in sacks, several boxes.

Q. You don't know what it was?

A. No, sir.

Q. You can identify it?

A. No, sir.

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Q. After you arrested them, you brought them to the St. Charles Hotel. Your car was there?

A. Yes, sir, by the St. Charles.

Q. Then you drove to 719 Common Street, how far distance was that?

A. Only about half a block.

Q. You took them out of the car and walked up to 719 Common?

A. I left them in the automobile there.

Q. What did you do?

A. I went back to room 466. While I was going to Room 466, I met other officers coming down.

Q. Where were the two prisoners?

A. In the car with Paul Gustafson and another officer.

Cross Examination Page 17 and 18
By Mr. Byrnes:

Q. How long did it take you from the time you arrested Linkletter and LaCaze to the time you brought them to 719 Common Street?

A. Mr. Byrnes, I would have to guess it. It was on a Sunday; it was raining. We had to call a photographer. The photographer was out on a job. Possibly for two hours.

Q. Where was the arrest made?

A. Right on the corner of St. Charles and Canal Street, by Stover's Candy Store.

Page 18

Q. And then you brought them to your squad car?

A. It wasn't my squad car; brought them to a squad car.

Q. From the time you made the arrest, put them in the car and made this call and brought them to 719 Common Street, it was approximately two hours, as a guess?

A. Yes, sir.

13 In view of the foregoing contained in paragraph one (1), it is respectfully submitted to the Court, that the arrest of Petitioner was illegal, that the search of Petitioner's person was illegal and the seizure of the set of keys marked by the State as S-27, and used as evidence in a criminal trial #161-524 against Petitioner, amounted to an "unreasonable" search and seizure and in violation of Petitioner's Constitutional rights under Article one (1), Section Seven (7) of the Constitution of Louisiana of 1921, and also a violation of "Due Process of Law" under that clause of the Fourteenth Amendment (14) and further in

violation of Petitioner's inherent rights under Amendment Four (4) of the Constitution of the United States.

II

On Sunday, August 24, 1958, while Petitioner was being booked at the First Police Precinct, other police officers went to Petitioner's home, 930 Poydras Street, New Orleans, La., they went there without Petitioner, and on arrival, found Miss Ruth Morrison, the officers barged past her when she opened the door and after harassing her, the police then ransacked Petitioner's home and they did not have a search warrant.

According to Court testimony, the police knew for a period of two days before Petitioner's arrest on August 24, 1958, that he resided at 930 Poydras Street, New Orleans, La. and therefore had ample time to procure a search warrant. The crime charged was alleged to have been committed on August 16, 1958, and the arrest and search and seizure of Petitioner's home was eight (8) days later. The articles that were seized from Petitioner's home were his *Personal Papers* and property, they are listed on Page 5 in the "Statement of Facts" in this petition. The State marked these things as; S-34, S-35, S-26, S-41 and S-32. These articles were used as evidence during trial of this cause (#161-524) against Petitioner. None of these seized articles were stolen, or ever claimed to have been.

The police seized a great deal of Petitioner's personal belongings, they sorted through these things, and picked out certain articles that created a set of circumstances which proved highly prejudicial to the cause of Petitioner. The use of Petitioner's *Personal Papers* and other articles as evidence, served only to confuse the jury, and caused them to be completely misled as to the alleged activity of Petitioner on August 16, 1958, the date charged in the Bill of Information, when the crime of this cause was alleged to have occurred.

14 The State used the *Personal Papers* of Petitioner as evidence against him during the trial of this cause (#161-524). This was a card which was inscribed by Petitioner and it listed several addresses and phone numbers, this card was marked by the State as S-32, the card had

no connection with any crime whatsoever, it did not carry the name, address, or phone number of the Variety Stag Bar, the premises that Petitioner was alleged to have burglarized, nor was any other place listed on this card (Marked S-32) the victim of any burglary, yet, this card was used as vidence during the trial of this cause against Petitioner, and Petitioner was prejudiced thereby.

It was the theory of the State, that this card, with writing on it by Petitioner, was a list of prospective victims of burglaries that were to have been burglarized at a later date by Petitioner. As proof of this theory, the State brought a witness into court by the name of "John Schwab", this witness gave testimony on Tr. 219, 220, 221, 222, and 223. John Schwab's testimony was to the effect that Soldani walked up the stairs of the Elk's Club, located at 705 Common Street, New Orleans, La., wanted Schwab to open the safe and demanded money. When Schwab told Soldani no, Soldani left. Schwab further testified the man had no weapon and no mask and said he wanted money.

John H. Soldani was the other person on trial of this cause (#161-524) with Petitioner. The Supreme Court of Louisiana in case #44,939, on February 15, 1960, ruled this story of "John Schwab" to be a "Total Lack of Evidence" against Soldani and ordered him discharged. The name Elk's Club was one of the names inscribed on the card by Petitioner. The State also brought into Court a handwriting expert to prove that the card was written by Petitioner, the fact that Petitioner had written the card in question (S-32) had never been denied by Petitioner. The writings contained on the card were only of a personal nature to Petitioner, and had no bearing on any crime whatsoever, the card was marked by the State as:

One card with phone numbers
and
addresses, Marked S-32

* * * *

The Court is respectfully asked at this time to read the following verbatim account of the testimony relating to the search and seizure at 930 Poydras St., New Orleans, La., on August 24, 1958, then the home of Petitioner. Excerpts from trial of this cause (#161-524). From Tr. 186 and 187.

15 Direct Examination

By Mr. Zibilich

POLICE MAJOR, WILLIAM J. McNAMARA

Q. Now you ultimately left 719 Common?

A. Yes, sir.

Q. Where did you go from there and with whom?

A. John Meredith and I went to 930 Poydras, I believe to apartment 4.

Q. What is that apartment 4?

A. It was the home of Victor Linkletter.

Q. Did you find anyone there?

A. We found Miss Ruth Morrison there.

Q. Did you search the place or do anything while you were there?

A. Yes, sir, we searched the place, Miss Morrison let us in and we conducted a search of the apartment.

Q. What was found in your presence?

A. In the apartment was taken out a pair of crepe sole shoes, a myriad of stuff came out of a drawer which according to Miss Morrison . . .

Q. Don't say what she said.

A. We took a lot of personal papers and a small screwdriver, a whole pillow slip came out of one of the drawers which we took out.

Q. Let me ask you this: had you ever seen the defendant Linkletter at or near 930 Poydras Street prior to this time?

A. Yes, sir, I did.

Q. When and under what circumstances?

A. Friday night, when we first set up a stakeout at the St. Charles Hotel.

Q. Would that be the 22nd?

A. 22nd somewhere around 10 P.M. I was on Common Street near Carondelet talking to Major Guillott when a man and a woman came up to 719 Common, the woman stood near the curb and the man walked towards the door as if he were going to open it. They turned and walked towards Baronne, turned left on Baronne and Captain Stevens and I followed them and they went up to 930 Poydras.

Q. Who were they?
A. Victor Linkletter and Ruth Morrison.
Q. You definitely remember it was 930 Poydras?
A. Yes.

(Petitioner's Underscore)

* * * *

The Court is now respectfully asked to read testimony that was given under oath in case #161-357, Section "H" Orleans Parish Criminal Court. The testimony is by the officer that arrested Petitioner on August 24, 1958.

OFFICER LAWRENCE VIGUIRIE

Direct Examination Page 6

By Mr. Hertz:

Q. Did you have occasion to go to 930 Poydras Street that day?
A. Later, yes, sir, the same day.
Q. For what purpose?
A. We met other officers there.
Q. Did you find anything there?
A. Quite a number of articles taken that belonged to Victor Linkletter. At the time I don't recall all of the articles.
Q. I show you specifically some paint are you able to identify any of these cans?
A. When you ask me about the question on the 24th, we had seen this paint here on the 24th, on a Sunday; but later I went back here on this date, on the 25th, got these cans of paint.
16 Q. What else did you see there?
A. There was clothing, a lot of papers, I don't recall anything other than that.

In view of the foregoing contained in paragraph two (2), it is respectfully submitted to the Court, that the search and seizure of Petitioner's personal belongings on August 24, 1958, articles marked by the State as S-34, S-35, S-26, S-41, and S-32, which were used as evidence against Petitioner during the trial of this cause, #161-524, amounted to an "unreasonable" search and seizure and in violation

of Petitioner's Constitutional rights under Article 1, Section 7 of the Constitution of Louisiana of 1921 and further the search and seizure is "unreasonable" under the Fourth (4th) Amendment to the United States Constitution and is a violation of the rights of Petitioner under the "Due Process of Law Clause" of the Fourteenth Amendment to the Federal Constitution.

In addition, the use of the card marked by the State as (S-32), which was the personal paper of Petitioner and had no connection with any crime, is in violation of Petitioner's rights under the Fifth (5th) Amendment to the Federal Constitution and further in violation of Petitioner's rights under the "Due Process of Law Clause" of the Fourteenth Amendment to the Federal Constitution and further a violation of Petitioner's rights of Article 1, Section 11, of the Constitution of Louisiana of 1921.

The use of the personal card as evidence during the trial of Petitioner was in effect under the Federal Constitution, to compel Petitioner to testify against himself.

Louisiana Law RS 15:45 prohibits searches and seizures to be conducted on a Sunday, the search and seizure described herein was conducted on Sunday August 24, 1958.

III

On August 25, 1958, Petitioner was taken from the First District Police Station to his home at 930 Poydras Street, New Orleans, La., on arrival, the police conducted a search of the premises, without a search warrant and over the Protest of Petitioner, The police had seized several cans of paint and this paint was used later as evidence against Petitioner during trial of this cause, #161-524. The trial Court permitted two of the several seized cans of paint to be used as evidence, they were marked by the State as:

Two cans of paint marked S-42 and S-43

17 The Court is respectfully asked at this time to read the following testimony of the officer that seized the several cans of paint from the home of Petitioner on August 25, 1958. Testimony taken from case #161-357, given under oath in Criminal District Court, Orleans Parish, Section "H" on October 14, 1958 at a preliminary hearing, pages 6 and 7.

OFFICER LAWRENCE VIGUIRIE

Direct Examination

By Mr. Hertz:

Q. I show you specifically some paint, are you able to identify any of these cans?

A. When you ask me about the question on the 24th, we had seen this paint here on the 24th, on a Sunday. But later I went back here on this date, on the 25th. Got these cans of paint.

Q. You saw that there on the 24th?

A. Yes, sir.

Q. Do you know who lived there?

A. Vic Linkletter and Ruth Morrison stated they lived there.

Q. You stated you went back there on the 25th.?

A. That's when we took this can of paint from the residence.

Q. Is that all you took from the residence?

A. That's all I remember. There may have been several cans of paint.

In view of the foregoing contained in paragraph three (3), it is respectfully submitted to the Court that this second search and seizure of the home of Petitioner, without warrant and over the protest of Petitioner, amounts to an "unreasonable" search and seizure. Two of the seized cans of paint were used as evidence against Petitioner during trial of this cause (#161-524), the cans of paint were marked by the State as S-42 and S-43 and Petitioner was prejudiced thereby.

This contended "unreasonable" search and seizure was done in violation of Petitioner's Constitutional rights under Article 1, Section 7, of the Louisiana Constitution of 1921, and further, is in violation of rights afforded Petitioner under the Fourth (4th) Amendment And violation of the "Due Processs of Law Clause" of the Fourteenth (14th) Amendment to the United States Constitution.

IV

On August 25, 1958, Petitioner was taken from the First District Police Station for a second time, and was then

taken to the Crescent City Novelty Shop, 4516 Magazine Street, New Orleans, La., which was a business establishment owned partly by Petitioner. On arrival the police conducted a search of this premises, which was the second time in two days that this premises had been searched without warrant. On this date August 25th, 1958 the police had seived several cans of paint over the protest of
18 Petitioner. When the police were asked if they had a search warrant by Petitioner, they stated that they didn't need one, the police said that they were under instructions to seize anything that could be used for evidence. They left with some tools and the several cans of paint. The paint was later attempted by the State to be used as evidence against Petitioner at trial of this cause, #161-524, but the trial Judge rejected it as not being relevant evidence.

The Court is respectfully asked at this point to read the following excerpts relating to the search and seizure of Petitioner's business establishment 4516 Magazine Street, New Orleans, La., on August 25, 1958. Testimony from case #161-357, Orleans Parish Criminal Court, Section "H".

OFFICER LAWRENCE VIGUIRIE
Direct Examination

By Mr. Hertz:

Q. Did you go to 4516 Magazine Street?
A. We did on the 25th.
Q. Did you take anything from 4516 Magazine Street?
A. Yes, sir, we took some paint from there, green paint.

* * * * *

The Court records in the case of this cause (#161-524) reveal that there had been a search conducted by the police on August 24, 1958 of the said Crescent City Novelty Shop, which was jointly owned by Petitioner, Ruth Morrison and John H. Soldani.

During this prior search by police, the Company books were examined by the police and done without Court order or search warrant and the same police were permitted

over the objection of Petitioner's attorney, to say before the jury certain information that the Company books contained. The police were also permitted to testify as to other things that they saw at said company during their search and Petitioner was prejudiced thereby.

The Honorable Court is respectfully asked at this point to read the following excerpts relating to the search and seizure of the Crescent City Novelty Shop, a business establishment owned partly by Petitioner, the search was conducted on August 24, 1958. Testimony taken from trial of this cause (#161-524) Orleans Parish Criminal Court, Section "E"

Direct Examination, Tr. 157

DETECTIVE JOHN MEREDITH

By Mr. Zibilich:

Q. Who directed you someplace?

A. Ruth Morrison.

Q. What did you do ultimately?

A. The Novelty Shop, but it didn't show much business. Major McNamara examined the books. There was a license what showed that Linkletter, Morrison
19 and Soldani were connected with this Novelty Shop. It was a one room place and they have a back room. I think it is an apartment. In the back there is also a community bathroom.

* * * * *

Direct Examination, Tr. 188

MAJOR WILLIAM J. McNAMARA

By Mr. Zibilich:

Q. Where did you go after you left 930 Poydras Major?

A. Went to the Crescent City Novelty Shop at 4516 Magazine Street.

Q. What is that particular place?

A. It was a novelty shop that sold funny books and records and a lot of other stuff. It was a company operating under the name Crescent City Novelty Shop and the license was issued to Ruth Morrison.

* * * * *

Direct Examination, Tr. 138
MAJOR JOHN BECKER

By Mr. Zibilich:

> During the trial of this cause, (#161-524) this officer was permitted to testify over the objection of Petitioner's Attorney, as to things seen during the search and seizure of the said business establishment, 4516 Magazine Street, on Augus 24, 1958.

* * * * *

When the case of this cause went before the Supreme Court of Louisiana on Appeal in case (#44,939) they had ruled on February 15, 1960, that *all* of the evidence, material or otherwise, in connection with the company known as the Crescent City Novelty Shop, 4516 Magazine Street, New Orleans, La., was "inadmissible" and that the evidence had no bearing whatever to the alleged crime (simple burglary, 134 Carondelet Street) on August 16, 1958.

On the basis of the above mentioned ruling of the Louisiana State Supreme Court in case #44,939 when the case was up on appeal, the Court ordered that Petitioner's copartner in crime (John H. Soldani) be discharged. All of the evidence used against both Petitioner and Soldani in connection with the Crescent City Novelty Shop was ruled to have been a "TOTAL LACK OF EVIDENCE". However, this evidence was used against Petitioner during the trial of this cause and the jury had this Louisiana Supreme Court declared "illegal" evidence before them when they deliberated on the verdict and Petitioner was prejudiced thereby.

See : *Amos* v. *United States*, 225 U.S. 313 (1921)

> "Witnesses may not testify as to what they saw during an illegal search"

* * * * *

20 In view of the foregoing contained in Paragraph Four (4), it is respectfully submitted to the Court that the seizure of "information" from the books of the Crescent City Novelty Shop and by the State permitting this said information to go before the jury, over the protest of Petitioner's Attorney, and as a result the police were permitted to say what they saw during an illegal

search of Petitioner's business establishment, this constituted a search and seizure that was "unreasonable" and contrary to the provisions of the Fourth (4th) Amendment and therefore the introduction of such evidence violated the rights of Petitioner under thhe "Due Process of Law Clause" of the Fourteenth (14th) Amendment to the Constitution of the United States.

It is also submitted that this is an "unreasonable" search and seizure under Article 1, Section 7, of the Constitution of Louisiana of 1921.

V

Legal Authorities Cited

Mapp v. *Ohio,* 81 S. Ct. 1684 (1961).

> "All evidence by searches and seizures in violation of the Constitution is Constitutionally inadmissible in State Courts"

* * * * *

At the time Petitioner was tried, his Constitutional rights not to have illegally seized evidence used against him in a Criminal prosecution, had not been recognized by the United States Supreme Court, *Wolf* v. *People of the State of Colorado*, 338 U.S. 25, 69 S. Ct. 1359. The U.S. Supreme Court held that in a prosecution for a State crime, the 14th Amendment does not forbid the admission of evidence obtained by unreasonable search and seizure though the evidence would be inadmissible in a Federal Court because of a violation of the Fourth Amendment.

The Louisiana Constitution of 1921, Article 1, Section 7, is practically the same, almost word for word, as the 4th Amendment to the United States Constitution, concerning searches and seizures.

In *State* v. *Fleckinger*, et al., 152 La. 337, 93 So. 115, decided April 7, 1922, rehearing denied, the Supreme Court of Louisiana held in substance that evidence illegally seized cannot be excluded or ordered returned before trial if relevant or pertinent to the issue, and that provisions of the Federal Constitution relative to searches and seizures (4th Amend. U.S. Constitition) have no application to State action. On application for rehearing three judges,

O'Niell, St. Paul and Leche, dissented from the majority opinion, denying same.

21 In *State* v. *Mastricovo*, 221 La. 312, 59 So. 2d. 403, the Supreme Court of Louisiana said:

"The jurisprudence of this State is settled beyond any question that relevant evidence, although seized without a search warrant, is non-the-less admissible," Citing:

State v. *Shotts*, 207 La. 899, 22 So. 2d 209;
State v. *Alvarez*, 182 La. 908 So. 162 So. 725;
State v. *Eddings*, 161 La. 240, 108 So. 468;
State v. *Davis*, 154 La. 405, 97 So. 590;
State v. *Lowry*, 153 La. 177, 95 So. 596;
State v. *Mims*, 153 La. 9, 95 So. 264;
State v. *Fleckinger*, 152 La. 337, 93 So. 115;
and *City of Shreveport* v. *Marx*, 148 La. 31, 89 So. 602

* * * * *

LOUISIANA * Effect of illegal search and seizure;

"Evidence otherwise admissible is not made inadmissible because obtained by search and seizure without a search warrant".

State v. *Zeblit*, 152 La. 594, 93 So. 912;
State v. *Tuggle*, 152 La. 747, 94 So. 377;
State v. *Hughes*, 152 La. 929, 94 So. 702;
State v. *Roy*, 152 La. 9, 95 So. 264;
State v. *Lowry*, 153 La. 177, 95 So. 596,
State v. *Weaver*, 157 La. 95, 102 So. 81.

* * * * *

Petitioner in view of the previous jurisprudence of the State of Louisiana at the time of his trial in (1959) had no Constitutional rights available to prevent a denial of his rights as expressed in State and Federal Constitutions, and the filing of a "motion to suppress illegally secured evidence", and reserve bills of exception to the ruling of the Court denying the motion, would in all probability have been a vain and useless act, i.e., in view of the vast number of adverse decisions handed down by the Supreme Court of Louisiana on the question of evidence obtained by illegal searches and seizures.

Petitioner therefore had no rights at the time of his trial in (1959) to prevent a denial of his Constitutional rights as recognized by *Mapp* v. *Ohio, Supra.*

Anticipating that it may be argued that Petitioner, by not objecting to the introduction of the illegally obtained evidence at the time of his trial, has waived his Constitutional right to predicate a Habeas Corpus action on the basis that his conviction was procured by illegally seized evidence obtained without a search warrant. Petitioner calls to the attention of the Court to the case of *Medberry* v. *Patterson,* 174 Fed. Supp. 720, which had for consideration an identical argument on habeas corpus application, said the court on Pape 724:

> "there is no doubt that one convicted of a crime may waive a constitutional right by failing to raise the question when orderly procedure requires that it be put in issue. *Brown* v. *Allen,* (1953) 334, U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469; *Ex Parte Spencer* 1913, 288 U.S. 652, 33, S. Ct. 709, 57 L. Ed. 1010. But it is also well settled that a constitutional right cannot be waived when the accused did not know or could not have known that one of his constitutional rights was violated and it is a matter of fact that no one knew or could have known in 1940 that the equal protection of the Fourteenth Amendment to the United States Constitution requires a state to furnish a free transcript to indigent defendants when that is the only method by which they may secure an adequate review and when the state allows as a matter of right." (Petitioner's Underscore)

Anticipating that it may be argued that the Petitioner is not entitled to relief because the *Mapp* v. *Ohio* Supra, cannot be retroactive, Petitioner's rights to invoke this decision in its principle has been conclusively settled by the United States Supreme Court in *Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U.S. 214, 78 S. Ct. 1061 2 L. Ed. 2nd 1269, (1958), by affirmatively sanctioning the retroactive effect of its decision in

Griffin v. *People of the State of Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 . . . .

* * * * *

Enlow v. *State*, 125 N.E. 2nd. 250.

Unlawful arrest cannot be the foundation of a lawful search, nor will information obtained by an unlawful search furnish the basis for a lawful arrest; and where and arrest or search is unlawful in the beginning, it it not made lawful by what afterwards takes place.

Cunningham v. *Baker*, 104 Ala. 160, 16 So. 68, 53 A.S.R. 27.

An Officer making an arrest has authority to search the person of his prisoner, but a search is justifiable only as an incident to a lawful arrest. If the arrest is unlawful the search is also unlawful.

Motovina v. *Hult*, 123, N. E. 2nd. 893.

An officer arresting without a warrant cannot justify his action in holding or detaining a prisoner for an unreasonable time before obtaining a warrant upon the grounds that such delay was necessary in order to investigate the case and procure evidence against the accused.

Angelo .. *United States*, 269 U.S. 20 (1925) 292, 295.

"Belief however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant and such searches are held unlawful not withstanding facts unquestionably showing probable cause".

Gouled v. *United States*, 225 U.S. 298 (1921); 292, 295.

Use in evidence, of papers seized in a search, unconstitutional under Amendment four (4), is in effect to compel defendant to become a witness against himself.

23 *Boyd* v. *United States*, 116 U.S. 616, (1886).

"A search and seizure of private papers in effect compels a man to testify against himself in violation of the Fifth Amendment privilege against self-incrimination, and therefore such a search and seizure

is unreasonable, and repugnant to the Fourth Amendment."

"There is a Constitutional difference between a search for things which are themselves prohibited such as stolen goods, and a search for books and papers sought as evidence, the latter being illegal".

People v. *Conway*, 225 Mich. 152, 195 N.W. 679 (1923).

It is also settled law that where the search is incidental to an arrest, the arrest, must occur before the search, and the search must be completed at the time of arrest.

Bram v. *United States*, 168 U.S. 532, 18 S. Ct. 42 L. Ed. 568, 10 A.M. CRIM. REP. 547.

Here Petitioner respectfully asks this Honorable Court to note the unusually strong language employed in the assailing of *unlawful searches and seizures.*

McDonald v. *United States*, 335 U.S. 445, 456, 69, S. Ct. at Page 193:

"The presence of a search warrant serves a high purpose and function, absent some grave emergency. The Fourth Amendment has interposed a magistrate between the citizen and the police. . . ."

Lisenba v. *People of State of California*, 314 U.S. 219, 236, 62 S. Ct. 280, 290, 86 L. Ed. 166.

"It is also established that the Fourteenth Amendment forbids, "Fundamental Unfairness in the use of evidence whether true or false."

Amos v. *United States*, 225 U.S. 313 (1921).

"Witnesses may not testify as to what they saw during an illegal search."

Angello v. *United States*, 46 S. Ct. 4, 269 U.S. 20, 70 L. Ed. 145, 51 A. L. R. 409.

"Held that evidence must be excluded, though the things seized were contraband, and though there had been no motion before trial if the facts were undisputed."

Weeks v. *United States*, 232 U.S. 383.

"and if a suspect, arrested without a warrant or without the existence of probable cause, is searched and

articles implicating him in crime are found, they may not be used as evidence in federal court."

Henry v. *United States*, 361 U.S. 98.

"Arrests on suspicion are not Constitutional."

People v. *Sovetsky*, 342 Ill. 583, 588, 175 N.E. 844, 846 (1931).

"The goods to be seized under a search warrant must be described with such certainty that they may be identified and with such particularity that the officer charged with the execution of the warrant will be left with no descretion respecting the property."

24 *Sgro* v. *United States*, 287 U.S. 206, 210 (1932).

Chief Justice Hughes once explained the underlying reason for the rules when he said:

"The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the 4th Amendment, and this together with legislation regulating the process should be liberally construed in favor of the individual."

Johnson v. *United States*, 333 U.S. 10 (1948).

"A search of the person is not lawful if its purpose is to discover grounds as yet unknown for an arrest, and in such a situation the search does not become lawful because of what is found."

United States v. *Lefkowitz*, 285 U.S. 452 (1932).

"But it has been held that the authority to search a house or place of business incidental to a lawful arrest is certainly not greater than that conferred by a search warrant. It follows that private papers wanted solely as evidence which could not be seized even under a search warrant issued upon ample evidence may not be taken as incidental to an arrest. (Petitioner's Underscore)

VI

Summation

While Petitioner even in his hunger for justice, is loath to point the accusing finger at the State of Louisiana for its over-zealousness in quest of a conviction, it must be abundantly clear to this Honorable Court, that the forces of Orleans Parish and the State of Louisiana, did merge, into a cabal, under the cloak of authority to mount the semblance of a case against Petitioner.

Your Petitioner, unlettered at Law, humbly apoligizes to this Honorable Court for any crudities that may possible affront the legal mind and asks the Courts indulgence.

Wherefore, To Be Relieved From Which Said Detention and Imprisonment, your Petitioner now applies, praying that a Writ of Habeas Corpus, to be directed to the said Victor G. Walker, Defendant, may issue in this behalf pursuant to the statute in such case made and provided, so that your Petitioner may be forthwith brought before this Honorable Court to do, submit to and receive what the law may require.

Certificate

Petitioner does hereby certify that a copy of the foregoing petition has been mailed postpaid, to the Hon.
25 Jack P.F. Gremillion, Attorney General for the State of Louisiana, State Capitol Building, Baton Rouge, Louisiana.

Due to the fact that Petitioner is a prisoner without the normal facilities available in these matters, return of service upon the Warden, the Defendant, Victor G. Walker, cannot be effected. But Petitioner does affirm that the Warden has been handed a copy of this petition.

* * * * * * * * * * *

Duly sworn to by Victor Linkletter jurat omitted in printing

(File endorsement omitted)

26 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Miscellaneous No. 648

(Title omitted)

Order to Show Cause—July 30, 1962

Upon the petition of Victor Linkletter, relator and petitioner in proper person, for issuance of a writ of habeas corpus,

IT IS ORDERED that Victor G. Walker, Warden of Louisiana State Penitentiary, and Jack P. F. Gremillion, Attorney General of the State of Louisiana, show cause before this Court at Baton Rouge, Louisiana, on September 7, 1962, at 2:00 o'clock p.m., why a writ of habeas corpus should not issue herein as prayed for.

IT IS FURTHER ORDERED that service of the order to show cause on respondents, Victor G. Walker, Warden of Louisiana State Penitentiary, and Jack P. F. Gremillion, Attorney General of the State of Louisiana, on or before August 10, 1962, at 12:00 noon, be deemed sufficient service.

/s/ E. GORDON WEST
United States District Judge

Dated July 30, 1962

Victor Linkletter
Victor G. Walker w/ copy of petition
Jack P. F. Gremillion w/ copy of petition

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27 **Minute Entry of Order for Continuance—September 7, 1962**

(Omitted in printing)

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28 **Minute Entry of Order for Defendant to File Memorandum, etc.—September 21, 1962**

(Omitted in printing)

(File endorsement omitted)

29 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

(Title omitted)

Motion to Dismiss Complaint—Filed September 20, 1962

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

/s/ JACK P. F. GREMILLION
Attorney General
State of Louisiana

/s/ SCALLAN E. WALSH
Assistant Attorney General
State of Louisiana

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30 **Notice of Motion to Dismiss Complaint and Affidavit of Scallan E. Walsh**

(Omitted in printing)

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32 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Docket No. 648—Miscellaneous

(Title omitted)

Minute Entry Extending Time to File Memorandum—October 8, 1962

At request of counsel for respondent, the time for filing a memorandum in this case is hereby extended to October 22, 1962.

E.S.W.

Jack P. F. Gremillion, Esq.
Victor Walker

(File endorsement omitted)

33 IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION, LOUISIANA

No. 648

Miscellaneous

STATE OF LOUISIANA, *Ex. Rel.*

VICTOR LINKLETTER, *Petitioner*

VS.

VICTOR G. WALKER, *Defendant, and The State of Louisiana*

Petitioner's Brief in Support of Habeas Corpus Application, and in Answer to Respondent's Motion to Dismiss—Filed November 6, 1962

JURISDICTION

This matter is properly before this Honorable Court as a result of an original petition for a writ of Habeas Corpus filed by the above named petitioner in this Court on July 9, 1962. Petitioner has exhausted all remedies in the Louisiana State Courts, including application for a Writ of Certiorari to the United States Supreme Court.

* * * *

MAY IT PLEASE THE COURT:

The case before the bar engages the Court in an effort to effectively apply basic facets of the Constitution and offers an occasion again to bring forth the inherent rights, available to each and every citizen, and to restore him to his liberty in the tradition of the judicial system of the United States Government and within the confines of the true and just interpretation of "Due Process of Law", of the Constitution of the United States.

State of Louisiana, ex rel, Victor Linkletter respectfully submits this brief, which has been written by petitioner in answer to the Respondent's Motion To Dismiss Petitioner's Habeas Corpus application which Motion To

Dismiss was filed in this Court on October 22, 1962, and respectfully Petitioner points out the following:

STATEMENT OF FACTS

Answering paragraph 1, Pages 2, 3 and 4 of the Respondent's "Brief To Dismiss".

Petitioner has no doubt that there was a simple burglary committed at the premises No. 134 Carondelet Street, in the City of New Oreans, Lousiana, on the 16th. of August 1958 as the Respondent alleges. However guilty in the eyes of the Law, Petitioner was convicted for a crime which he had never committed.

None of the burglar tools that the police had found
34 at the scene of the crime on the morning of August 17, 1958 were ever owned by Petitioner or ever in his possession and no court witness had ever made such a claim.

It was the opinion of a paid State witness, one John Koch, that a certain paint found on a crowbar that was left by the burglars at the scene of the crime could have been the same paint as that seized from Petitioner's home 930 Poydras Street. Mr. Koch under cross examination also stated "that he could have made one test at his Lab that could have proven beyond all doubt if the paint on the crowbar and the paint found at the home of Petitioner was the one and same paint. When Mr. Koch was asked by Petitioner's attorney why he did not make such a test, he said, that he did not have the time to make such a test."

Petitioner would like to point out here that he was made to wait nine (9) months before he had been called up for trial on this case, No. 161-524.

The cans of paint in question were marked by the State as S-42 and S-43 and were used during the trial as evidence during the trial of this cause.

Under the Respondent's statement of facts at the bottom of Page 2 and top of Page 3 of their Brief, the fact is stated "that (LINKLETTER) was observed by Officers in the act of opening the window on the third floor of the building 719 Common Street, climbing out on the roof and reentering the building. At this time he did not have on a shirt and was wearing a pair of gloves."

PETITIONER CONTENDS THAT THE STATEMENTS ARE NOT TRUE AND THAT PETITIONER NEVER CLIMBED OUT OF ANY WINDOW, OR REENTERED AND WINDOW AT 719 COMMON STREET, OR AT ANY OTHER PLACE.

THERE WAS NO STATE WITNESS DURING THE ENTIRE COURSE OF THE TRIAL OF PETITIONER NO. 161-524, THAT EVER MADE SUCH A CLAIM.

In support of Petitioner's contention as to the untruth of the Respondent's claim, excerpts from the trial of this cause No. 161-524 are shown below.

May 27, 1959, witness for the State,

OFFICER JUSTIN FAVALORA
Under Direct Examination Page 131

By Mr. Zibilich:

Q. What were you in Kolb's?
A. We were on the third floor of Kolb's.
Q. Say WE, who was with you?
A. Officer Fernandez.
Q. You were on the third floor of Kolb's?
A. In the back part in the quarters facing the rear end of 719 Common St.
Q. Did you observe anything while you were looking at this third floor apartment of 719 Common St?
A. Yes Sir. I would say approximately about 2:30, I noticed Victor Linkletter in the third floor without a shirt on and a pair of brown gloves on.
Q. Wearing the gloves?
A. Yes Sir.
Q. What did you do if anything?
A. He came to the window where that is, where I recognized him and he just kept walking around, he would g[illegible] close by the window and then he would disappear and then he would appear at the window.
Q. Did he ever open the window?
A. No Sir, but if I remember right the window was half way open.

By the Court: Page 131.

Q. Did you observe anything else after this?
A. No Sir.

Page 132-

Q. Where was your partner Fernandez?
A. Standing by me, right there.

* * * * *

The same question concerning whether or not anyone had ever gone out on the 719 Common Street roof on August 24, 1958 came up during a preliminary hearing in Judge Bagert's Court "Section H" case No. 161-357 and it was positively stated that nobody had entered on any roof. For this very reason the Orleans Parish District Attorney would not accept any charges of attempted burglary against Petitioner and others as the police had requested he do several days after the August 24, 1958 arrest. At this time the police had tried to have Petitioner charged with Attempted Burglary of Kolb's Restaurant, hence there was no attempt, so there was no charge.

Petitioner further contends that nowhere in the trial court records will it show that there was ever any claim by any of the State witnesses that Petitioner had ever been seen on any roof such as described to this Honorable Court in the Respondent's Brief as filed in this Court on October 22, 1962.

At the top of Page 3 of Respondent's Brief the statement is made that the Petitioner and La Caze were immediately after an arrest on August 24, 1958, taken back to the third floor of the premises located at 719 Common Street.

PETITIONER CONTENDS THAT THE ABOVE STATEMENT BY THE RESPONDENT IS NOT TRUE * * * AND IN SUPPORT OF YOUR-PETITIONER'S CONTENTION, THE ENTIRE COURT TESTIMONY FROM CASE NO. 161-357 SECTION H, IS NOW SUBMITTED AS GIVEN BY OFFICER LAWRENCE VIGUIRIE IN THAT CASE, THE TESTIMONY IS MARKED AS APPENDAGE "A". PETITIONER HOLDS THE ORIGINAL SIGNED AND CERTIFIED COPY. THE ARREST IS THE ONE AND SAME THAT THE RESPONDENT SPEAKS OF ON 14th. AUGUST 1958. PETITIONER HAD TRIED TO OBTAIN THIS OFFICERS' COMPLETE TESTIMONY FROM THE COURT SECTION "E" CASE NO. 161-524, BUT COULD NOT GET AN ANSWER BY MAIL.

36 Petitioner here asks the Honorable Court to read the following excerpts as taken from Case No. 161-357, Section "H".

OFFICER LAWRENCE VIGUIRE

Page 15 Appendage "A"

Q. Were you there when they brought Linkletter and La Caze back from being arrested on St. Charles near Canal Street? You participated in the arrest personally?

A. Yes, sir, Paul Gustafson and myself.

Q. After you arrested them, you brought them to the St. Charles Hotel. Your car was there?

A. Yes, sir, by the St. Charles.

Q. Then you drove to 719 Common Street. How far distance was that?

A. Only about half a block.

Q. You took them out of the car and walked up to 719 Common?

A. I left them in the automobile there.

* * * *

PETITIONER WOULD LIKE TO DIRECT THE COURT'S ATTENTION TO PAGES 17 AND 18 OF APPENDAGE A WHERE OFFICER LAWRENCE VIGUIRIE'S SHOWS THAT PETITIONER AND LA CAZE WERE HELD IN A PARKED POLICE AUTOMOBILE FOR ALMOST "2" HOURS BEFORE BEING BROUGHT BACK TO THE 719 COMMON STREET BUILDING, AND THIS IS NOT AS THE RESPONDENT CLAIMS IN THEIR BRIEF.

* * * *

During the course of the trial of this cause No. 161-524, a witness for the State under cross examination made the following statements.

DETECTIVE JOHN MEREDITH:

Page 164, and 165

By Mr. Byrnes:

Q. When you went with Major Mc Namara to 719 Common, that was August 24, 1958.

A. Right sir.

Q. And everything you are speaking of about what you saw at 719 Common St. was on the 24 of August, am I right?

A. Right Sir.

Q. From there do you know where Linkletter and La Caze were arrested?

A. Was I present?

Q. Do you know where they were arrested?

A. On St. Charles near Canal.

Q. And were they at 719 Common before you arrived or after you arrived?

A. I didn't arrest them.

Q. And were they at 719 Common before you got there or after?.

A. We went up to 719 and they were brought back to 719.

Q. How long after you got there was Mr. Linkletter and Mr. La Caze brought in?

A. Referring to the third floor at 719?

37 Q. Yes.

A. Couldn't have been more than 10 or 15-fifteen minutes.

THE CONTENTION OF PETITIONER IS THAT THE ABOVE SHOWN EXCERPTS SHOW THAT PETITIONER WAS NOT IMMEDIATELY TAKEN BACK TO THE 719 COMMON STREET BUILDING AS THE RESPONDENT ALLEGES ON THE TOP OF PAGE 3 OF THEIR BRIEF ON THE MOTION TO DISMISS.

The respondent further alleges to this Honorable Court on page 3 of their brief that Petitioner and La Caze were brought back to the premises 719 Common Street, that upon the roof of this building, they found burglar equipment and tools.

PETITIONER CONTENDS THAT THIS STATEMENT BY THE RESPONDENT IS NOT TRUE AND THAT NOWHERE IN THE ENTIRE CASE WAS THIS CLAIM MADE, OR *ANY MENTION* OF ANY TOOLS OR EQUIPMENT FOUND ON ANY ROOF EVER MADE IN ANY COURT TESTIMONY WHATSOEVER, NOR WAS THERE ANY TESTIMONY OF ANY OF THE STATE WITNESSES THAT ANY OF THE EQUIPMENT ALLEGED TO HAVE BEEN BURGLARY EQUIPMENT WHICH WAS FOUND IN THE PREMISES 719 COMMON STREET, WHICH COULD HAVE BEEN USED FOR THE BURGLARY OF THE VARIETY STAG BAR, 134 CARONDELET STREET, WAS EVER ACTUALLY USED BY PETITIONER OR BY ANYONE ELSE FOR THAT PARTICULAR PURPOSE OR EVEN IN PETITIONER'S POSSESSION ON AUGUST 16, 1958, THE DATE THE ALLEGED BURGLARY WAS TO HAVE OCCURRED. THE ENTIRE CASE OF THE STATE WAS BASED ON THEORY OF CIRCUMSTANTIAL EVIDENCE.

Petitioner asks the Honorable Court to refer to Page 4 of Appendage "A" which will show that there were no

tools or equipment ever found on the roof of the 719 Common Street as the Respondent has presented to this Court in their Brief.

OFFICER LAWRENCE VIGUIRIE,

Page 4 of Appendage "A",

Q. Did you go upstairs in 719 Common Street?
A. Yes, sir.
Q. Which floor?
A. Well, it would have been the second floor.
Q. The second floor?
A. It would have been the top floor, the third floor. The basement floor, the second, it would have been the third floor.
Q. What did you find there?
A. There was an oxygen tank, an acetelene tank, extention ladder, crow bars, burning torch, three weapons; might have been other things I don't recall.

Page 5-

Q. Officer, I show you State Exhibit 6, are you able to identify the subject matter of that photograph?
A. Yes, sir.
Q. What is that?
A. On our return to 719 Common Street, on the uppermost floor, this is how we found the oxygen tank and the acetelene cylinder, the box containing the tools which were all secured at the time. It was back up here on this platform like, which we later dusted for prints, and it contained I think a thirty-eight caliber revolver and holster.

38 Q. Was anything—Does that picture represent a true picture of the way things were when you saw them first, Officer Viguirie?
A. As near as I can remember it does.

Page 12-

Q. You say that S-6 represents to the best of your recollection a true picture of what was on that platform when you walked in with the other arresting officer, is that correct?
A. I would say this is just about it. If I'm not mistaken this box may have been moved. When I got there, after we called for a photographer, the photo-

grapher took these pictures, after taking the pictures, the Bureau of Identification went all over evidence for fingerprints.

Page 16-

Q. And all this paraphernalia was on this platform as portrayed in this photograph?

A. Yes, sir.

PETITIONER CONTENDS THAT THE ABOVE SHOWN EXCERPTS SHOW THAT THERE WAS NO CLAIM THAT ANY TOOLS OR EQUIPMENT WERE FOUND ON A ROOF AT THE 719 COMMON STREET BUILDING ON AUGUST 24, 1958 AS THE RESPONDENT ALLEGES IN THEIR BRIEF TO THIS HONORABLE COURT AND FURTHER, PETITIONER CONTENDS THAT NO WITNESS AT ALL EVER MADE ANY SUCH CLAIM DURING THE ENTIRE COURSE OF THE TRIAL NO. 161-524, SECTION "E".

On Page 3 of the Respondent's Brief it is stated as following:

". . . that officers searched Linkletter's person and found a key to his home 930 Poydras Street"

THIS STATEMENT IS CORRECT, THE ABOVE MENTIONED SEIZED KEY WAS LATER MARKED BY THE STATE AS S-27 AND USED AS EVIDENCE DURING THE TRIAL OF THIS CAUSE.

However, just after the above statement of the Respondent, they claim as follows,

". . . and thereupon took Linkletter with them to his apartment at 930 Poydras Street . . ."

PETITIONER CONTENDS THAT THIS STATEMENT AS ALLEGED BY THE RESPONDENT IN THEIR BRIEF IS NOT TRUE AND THAT WHEN THE POLICE WENT TO THE HOME OF PETITIONER 930 POYDRAS STREET ON 24 AUGUST 1958, THEY WENT *ALONE* AND NOT WITH PETITIONER AS CLAIMED.

THE HOME OF PETITIONER WAS ABOUT 7 BLOCKS FROM WHERE THE AUGUST 24 ARREST TOOK PLACE AND JUST ABOUT AS FAR FROM THE SAID 719 COMMON STREET BUILDING.

THERE WAS NO GREEN PAINT SEIZED FROM PETITIONERS HOME ON AUGUST 24, 1958 AS THE RESPONDENT CLAIMS IN THEIR BRIEF AND NO WITNESSES HAD EVER MADE THIS CLAIM DURING THE ENTRE COURSE OF THE TRIAL.

NEVER AT ANY STAGE OF THE ENTIRE TRIAL HAD THERE EVER BEEN ANY CLAIM THAT ANY PAINT EVER SEIZED AT THE HOME OF PETITIONER MATCHED PAINT FOUND ON TWO

CROWBARS FOUND ON THE ROOF OF THE BUILDING AT 719 COMMON STREET.

AS A MATTER OF FACT, THERE IS *NO TESTIMONY* IN THE ENTIRE RECORDS OF THE COURTS (SECTION H OR SECTION E) THAT ANY CROWBARS WERE EVER FOUND ON *ANY ROOF WHATSOEVER* AS THE RESPONDENT ALLEGES IN THEIR BRIEF TO THIS COURT. THERE WAS NO TESTIMONY GIVEN THAT EVER CLAIMED THAT ANY PAINT WAS EVEN ON ANY CROWBARS THAT WERE FOUND AT THE 719 COMMON STREET BUILDING.

39 PETITIONER in support of his contentions asks the Honorable Court to read the following excerpts as can be found in the testimony of one Officer Lawrence Viguirie on Page 4 of Appendage "A" which is as follows:

Q. What did you do, officer?
A. We arrested La Caze and Linkletter.
Q. What did you do next, if anything?
A. Brought them back to the—in front of the St. Charles Hotel.
Q. What else did you do?
A. After we returned from 719 Common Street, Captain Stevens, Sergeant Le Blanc and myself brought them to the First District and booked them.

Page 6-

Q. Did you have the occasion to go to 930 Poydras Street that day?
A. Later, Yes, sir, the same day.

Page 12-

Q. Then you took them back out and booked them?
A. Yes, sir.
Q. You were there when they were booked?
A. Yes, sir.
Q. Did you book them?
A. No, sir, Captain Stevens.
Q. What were they booked with?
A. Probably 107, investigation of burglary of Kolb's Restaurant.

The following are excerpts from the trial of this cause No. 161-524, Section "E" as given by one of the State witnesses on Tr. 186-187.

Direct Examination

POLICE MAJOR, WILLIAM J. McNAMARA

By Mr. Zibilich:

Q. Now you ultimately left 719 Common?
A. Yes, sir.
Q. Where did you go from there and with whom?
A. John Meredith and I went to 930 Poydras, I believe to apartment 4.
Q. What is that apartment 4?
A. It was the home of Victor Linkletter.
Q. Did you find anyone there?
A. We found Miss Ruth Morrison there.

The above shown testimony of Officer Lawrence Viguirie and that of Police Major Wm. J. McNamara tend to show that Petitioner was not taken to his home on August 24, 1958 as the Respondent alleges in their Brief to this Court.

As a Matter of Fact, Petitioner's attorney Leonard A. Calcagno was at the police precinct talking with Petitioner when the police arrived there with Miss Ruth Morrison which time they also booked Miss Morrison with all the same charges that they had booked Petitioner with and this Attorney had made the police at that time give him a receipt for some diamond rings that they had seized from the fingers of Miss Morrison, the police were just coming from searching the home of Petitioner and without Petitioner being present.

About the center of Page 3 of the Respondent's brief, they state as following:

"... and also found a traffic summons issued to Linkletter on August 14th, two days prior to the burglary. ..."

PETITIONER DENIES THIS ALLEGED FACT AS PRESENTED TO THIS HONORABLE COURT BY THE RESPONDENT SINCE THERE WAS NEVER ANY TRAFFIC SUMMONS SEIZED BY THE POLICE WITH THAT DATE AUGUST 14, 1958 AS CLAIMED IN THE RESPONDENT'S BRIEF.

During the Search of Petitioner's home on August 24, 1958, the police had found in one of the dresser drawers a

traffic summons issued to Petitioner, This traffic summons was issued to Petitioner by one Officer Ralph Fink of the New Orleans Police Dept. and was given to Petitioner while at S. Broad St. and Tulane Avenue while heading in the direction of Baton Rouge.

THE SUMMONS No. B * 54098 was issued on August 20, 1958 and not on August 14, 1958 as the Respondent alleges.

The auto driven by Petitioner was owned by one of Petitioner's business associates, John H. Soldani and this automobile was often used in connection with the business activities of the Crescent City Novelty Company located at 4516 Magazine Street, New Orleans, La., which was a Company owned by Miss Ruth Morrison, John H. Soldani and Petitioner.

The said traffic summons was for the amount of $1.00, the said summons was used as evidence during the trial of this cause and was marked by the State as S-26.

THE RESPONDENT GOES ON TO SAY IN THEIR BRIEF AS FOLLOWS:

> "... that this vehicle had been used to convey persons who had rented from the Industrial Air Brakes of the South, a tank of oxygen and a tank of aceteyline. Four crowbars were noticed in the trunk of the care on August 14th. ..."

PETITIONER WOULD LIKE TO POINT OUT THE FACT THAT THE RESPONDENT DOES NOT CLAIM HERE THAT THE SAID VEHICLE SPOKEN OF WAS USED BY PETITIONER OR BY ANYONE ELSE CHARGED WITH THE CRIME OF THIS CAUSE TO CONVEY THE SAID TANKS THAT HAD BEEN RENTED FROM SAID COMPANY, THE RESPONDENT MERELY SAYS "TO CONVEY PERSONS"

41 PETITIONER CONTENDS that he had never driven said vehicle on the day of August 14, 1958 as the Respondent has alleged in their Brief to this Honorable Court, further there was not one single witness that ever testified that the said Soldani owned car was ever used in the alleged simple burglary of this cause on the day of the alleged crime August 16, 1958.

THE FOLLOWING are names of persons that worked for the Industrial Air Products of the South, (now called Gen-

eral Dynamics, located at 907 S. Peters Street, New Orleans, Louisiana.)

1. Mr. Oren Hymel
2. Mr. Eugene Tanguys
3. Mr. Joseph Morris
4. Mr. Charles Brecka

EACH AND EVERY ONE of these above listed persons testified in a Court of Law under OATH that not only Petitioner, but that none of the others charged with the crime of this cause EVER CAME to their Company at any time whatsoever, this would mean that other persons than those charged were those that went to the said Air Products Company when tanks were rented on the days of August 14th. and August 19th., 1958.

ON AUGUST 14th., 1958, Mr. Oren Hymel sold two tanks, one oxygen, one acetelyne, to a Mr. Joseph Cramer of Buras, Louisiana and during the transaction of this sale he copied down the license number of the vehicle making the purchase and then turned this over to his boss Mr. Brown, at this time the police were called and on their arrival were given the copied down license number, the piece of paper that the number had been copied down on was retained by Mr. Hymel and after the police had left, Mr. Hymel had destroyed the paper containing the number and had thrown it away.

SEVERAL DAYS LATER, after the search and seizure of the traffic summons No. B-54098 from the dresser drawer at the home of Petitioner, 930 Poydras Street, which was the only traffic ticket issued to Petitioner, the Police had gone back and had a talk with Mr. Hymel, and at this time, Mr. Hymel was told that he had given them the wrong license number and then at that time Mr. Hymel was handed a new number, which was the same number as contained on the traffic summons No. B-54098.

DURING THE TRIAL OF THIS CAUSE No. 161-524, Mr. Hymel stated under oath when shown photos of the Soldani car; that he could not say that that was the auto, and that the license number was not the same.

42 A DRAY RECEIPT WHICH WAS OBTAINED FROM THE SAID AIR PRODUCTS COMPANY WAS MARKED BY THE

STATE AND USED AS EVIDENCE AGAINST PETITIONER DURING THE TRIAL OF THIS CAUSE (RECEIPT NO. 25558) (MARKED BY THE STATE AS S-28), HAD SHOWN THE PURCHASE OF TWO TANKS THAT WERE SOLD TO ONE JOSEPH CRAMER OF BURAS, LOUISIANA ON 14TH. AUGUST 1958.

THE ABOVE MENTIONED TANKS ARE THOSE THAT THE RESPONDENT REFERS TO IN THEIR BRIEF TO THIS COURT, THESE TANKS WERE NEVER BROUGHT INTO COURT AS EVIDENCE, OR AS FAR AS PETITIONER KNOWS, THEY WERE NEVER POSSESSED BY THE POLICE.

IF ANY TANKS AT ALL THAT ARE REFERRED TO IN THE RESPONDENTS BRIEF WERE USED DURING THE TIME OF THE ALLEGED SIMPLE BURGLARY INVOLVED IN THIS CASE, THEN THE ABOVE MENTIONED SET OF TANKS WOULD HAVE TO HAD BEEN THE ONES USED. THE SET OF TANKS THAT WERE BROUGHT INTO THE COURTROOM AS EVIDENCE DURING THE TRIAL OF THIS CAUSE WERE ACTUALLY IN THE POSSESSION OF THE SAID AIR PRODUCTS COMPANY AT THE TIME OF THE ALLEGED SIMPLE BURGLARY OF THE VARIETY STAG BAR, WHICH SAID BURGLARY WAS ALLEGED TO HAVE OCCURRED ON AUGUST 16, 1958.

THE SET OF TANKS THAT THE RESPONDENT REFERS TO ARE ONES THAT WERE PURCHASED BY JOSEPH CRAMER AND OTHERS ON THE 19th. AUGUST 1958 UNDER DRAY RECEIPT NO. 25570, DATED 19th. AUGUST 1958. (MARKED BY THE STATE AS S-29).

Mr. Oren Hymel, the person who sold the set of tanks to one Joseph Cramer on August 14th. and on August 19th., 1958 testified under Oath as follows:

Under Direct Examination, in Section "E" Case No. 161-524

MR. OREN HYMEL, Tr. 131

By Mr. Zibilick:

Q. Did you know Joseph Cramer?
A. No Sir, never seen him before.
Q. Could you identify him if you saw him again?
A. I think I could.
Q. Do you see him in the courtroom today?
A. No sir I don't.

Q. Show you a picture marked state 7 for identification and ask you to look at it carefully and I will ask whether Joseph Cramer is among those?

A. No Sir, Joseph Cramer is not amongst those.

PETITIONER AND JOHN H. SOLDANI were in the courtroom on trial and the photograph state 7 was a picture of one Joseph La Caze who was the person arrested with Petitioner on August 24, 1958.

LATER DURING THE TRIAL OF THIS CAUSE Mr. Oren Hymel stated the following:

Under Cross Examination, Tr. 202

MR. OREN HYMEL,

By Mr. Byrnes:

43 Mr. Oren Hymel, Under Cross Examination;
By Mr. Byrnes

Q. But neither of these two persons here is Cramer?

A. Definitely not.

Q. You saw a third man in the other car and you said he was not Cramer?

A. That's right.

Direct Examination, from the trial of this cause No. 161-524

MR. OREN HYMEL,

By Mr. Zibilich:

Q. I show you a picture here marked State 15 for identification and ask you to look at that automobile and more particularly the license number and tell me whether or not that is the same vehicle you had the tanks put in?

A. I don't remember the license number. I had written it down, but I don't remember it now, and by this picture I could not identify this car.

THE EXCERPTS AS SHOWN BY PETITIONER ABOVE TEND TO SHOW THAT THERE WAS NO CLAIM BY THIS WITNESS AS A MATTER OF FACT, BY ANY OTHER WITNESS DURING THE COURSE OF THE TRIAL THAT STATED THAT EITHER PETITIONER

OR ANY OF THE OTHERS CHARGED WITH THE CRIME EVER WENT TO THE SAID AIR PRODUCTS COMPANY ON THE DAY OF AUGUST 14, 1958, NOR WAS THERE ANY TESTIMONY DURING THE TRIAL THAT STATED THAT THE SAID SOLDANI OWNED C R EVER WENT TO THE SAID AIR PRODUCTS COMPANY ON THAT DATE.

The Respondent had claimed in their Brief on Page 3 that Petitioner had been issued a traffic summons on 14th. August, which date said auto was said by respondent to have been driven by Petitioner. Petitioner asks the Court to examine the State exhibit marked by the state as S-26 and see for itself that the date is August 20, 1958.

THE RESPONDENT STATES on Page 3 of their Brief the following:

> "... that four crowbars were noticed in the trunk of this car on August 14th. ..."

THERE WAS NO CLAIM during the course of the entire trial that the Soldani owned car was the one and same car that were seen, nor were any crowbars connected with this case ever identified or claimed to have been any of the four crowbars that were seen in an automobile at the said Air Products Company on 14th. August 1958.

MR. JOSEPH MORRIS, who was a witness for the State during the trial of this cause was the person that claimed that he had seen four crowbars in the back of an automobile that came to his company on August 14, 1958.

Direct Examination, Case No. 161-524 Section "E"
MR. JOSEPH MORRIS

By Mr. Zibilich:

44 Q. Did you load any tanks specifically in a blue 1949 Ford, you remember anything about that?
A. If automobile come there I loaded it.
Q. You load every automobile?
A. Yes.
Q. Did you see an automobile that had crowbars in the back of it?
A. Yes Sir.
Q. How many crowbars?
A. .....

By Mr. Byrnes: Page 204, I object as to his leading the witness.

EXAMINATION RESUMED BY MR. ZIBILICH:

Q. How many did you see?
A. I think it was three, no four.

Under Cross Examination *Page 204
MR. JOSEPH MORRIS,

By Mr. Byrnes:

Q. You remember this particular loading?
A. I remember loading it because was suspicious of the four crowbars, but to say what the car was I can't say.

MR. JOSEPH MORRIS was shown photographs of the Soldani car and he did not claim that it was the one and same car that he saw four crowbars in on August 14, 1958 and Mr. Morris also stated that neither Petitioner or Soldani or the picture shown to him of Joseph La Caze was ever the persons that came to the said Air Products on August 14, 1958.

The Respondent states in their Brief that:

". . . on the 20th. of August, four days after the burglary of the Variety Stagg Bar, these same tanks were returned and two new tanks were rented . . ."

PETITIONER DENIES THIS ABOVE STATEMENT BY THE RESPONDENT SINCE STATE EXHIBIT S-29 WHICH WAS A DRAY RECEIPT THAT THE POLICE OBTAINED FROM THE SAID AIR PRODUCTS COMPANY, NO. 25570 WAS DATED ON AUGUST 19, 1958, WHICH IS NOT AS THE RESPONDENT CLAIMS ON AUGUST 20th. IN THEIR BRIEF. (On Page 3)

PETITIONER WAS NOT IN THE POSSESSION OF ANY AUTOMOBILE ON THE 14th. August or on the 19th. August 1958.

TRAFFIC SUMMONS No. B-54098 was issued to Petitioner on August 20th. 1958.

PETITIONER has tried to clarify these points so that it would not appear to this Honorable Court that any auto-

mobile was in the possession of Petitioner on the dates as the Respondent alleges to this Court.

45 THE RESPONDENT just below the center of the paragraph on Page 3 of their Brief to this Honorable Court, state the following;

> "Later, on the 20th. of August, four days after the burglary of the Variety Stag Bar, these same tanks were returned and two new tanks were rented."

PETITIONER would like to point out here concerning the above statement by the Respondent the following points;

1. That the tanks that the Respondent speaks of were purchased from the said Air Products Company by one Joseph Cramer and all transactions concerning said tanks with said Company were conducted by only the said Joseph Cramer.

2. Each and every State witness that observed the various transactions of Joseph Cramer and others, all came into Court and testified that none of the persons that were on trial or charged with the said burglary were the same persons that came to their Company not only on the 14th. and 19th. of August, 1958, but that the defendants were never seen at the Company at any other time.

3. Further, there was never at any stage of the entire trial any evidence shown that the tanks that the Respondents speak of were ever used by Petitioner or by anyone else for any illegal purposes, or any evidence shown that the said rented tanks were ever used during or at the simple burglary of the said Variety Stag Bar on the 16th. of August 1958.

CONTINUING ON PAGE 3 of the Respondents Brief just following the above shown statement, the Respondent states the following;

1. "On August 26th., officers went with Linkletter to his apartment at 930 Poydras Street and later the same day, accompanied him to a place of business at 4516 Magazine Street, which place was operated by Linkletter and another."

2. "One of the crowbars with green paint on it, found at the Variety Stag Bar, along with a can of green paint found in the business place at 4516 Magazine Street, were examined at the State Crime Laboratory, along with a screwdriver found in Linkletter's home and the paint found at the business establishment was identical to that found on the screwdriver found in Linkletter's home and on the crowbar found at the Variety Stag Bar."

PETITIONER DENIES the second part of his above shown statements as shown by the Respondent on Page 3 of their Brief to this Court, the following are facts which Petitioner wishes to bring to the attention of this Honorable Court concerning the paint that was seized from the business establishment of Petitioner as the Respondent shows above; DURING THE COURSE OF THE TRIAL OF THIS CAUSE the State had tried to introduce into evidence the paint that the police had seized from the said business establishment 4516 Magazine Street which is the same paint that the Respondent speaks of as shown above in their state-
46 ment as in their Brief (P. 3) the trial Judge had rejected this seized paint as evidence as not being revelant and Petitioner had tried to bring this seized paint to the attention of the Honorable Court at St. Francisville, Louisiana on the 8th. of December 1961 at a Habeas Corpus hearing and this question concerning the seizure of said paint from said business place was brought out in the original Petition for a Writ of Habeas Corpus in the lower State Court and here (20th. Judicial District Court) the Respondent in their RESPONSE TO PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS, as filed with the said Court claimed the following concerning the seized paint from your Petitioner's business establishment; Paragraph 4

4.

"Respondent would show that no answer is required to the allegations contained in Paragraph 4 of the petition for the reason that the evidence obtained during the search referred to therein was not admitted in evidence, hence petitioner was not prejudiced thereby."

PETITIONER submits to this Honorable Court a copy of the above mentioned response of Respondent and marks it as Appendage "B" and asks the Court to examine same.

IT WOULD APPEAR to Petitioner that the Respondent is now attempting to show that Petitioner was prejudiced by the seizure of said paint that was seized from the said business establishment.

THE RESPONDENT SHOWS on the top of Page 4 of their Brief the following;

> "During the course of this investigation, it was discovered that Linkletter and his companion, on August 12, 1958, had rented the third floor of the building at 719 Common Street, which permitted easy access to the other buildings in that square. . . ."

PETITIONER DENIES THE ABOVE SHOWN STATEMENT AS MADE BY THE RESPONDENT TO THIS HONORABLE COURT. AT NO STAGE OF THE ENTIRE TRIAL DID ANY WITNESS WHATSOEVER MAKE THE CLAIM OR STATEMENT THAT PETITIONER AND HIS COMPANION HAD RENTED THE SAID 719 COMMON STREET PREMISES.

NOT A SINGLE WITNESS HAD MADE THE CLAIM THAT PETITIONER HAD RENTED THE SAID 719 COMMON STREET PREMISES, OR EVER STATED THAT PETITIONER WAS WITH THOSE THAT DID RENT THE SAID PREMISES ON THE 12th. AUGUST 1958.

MR. JOHN A. HARRIS, who was the owner of the said 719 Common Street building came into Court as a witness for the State, according to the sworn testimony of Mr. Harris, neither of those on trial were the persons that had come to him and rented the said premises, (Petitioner and John H. Soldani) were in the courtroom on trial.

47 THE RESPONDENT goes on to show at the top of Page 4 of their Brief to this Honorable Court the following;

> ". . . which permitted easy access to other buildings in that square, and, it was upon the roof of this building that the officers found the burglary equipment and tools above mentioned . . ."

PETITIONER DENIED the above statement of the Respondent that any tools had ever been found on the roof of said

building as the Respondent is now claiming in their Brief to this Honorable Court and this denial and excerpts are shown by Petitioner on Page 5 of this Brief now being filed by Petitioner and furthermore, no other witnesses whatsoever had made any such claim during the entire course of the trial or in any other Court of Law. (See Pages 4, 5, 12 and 16 of Appendage "A")

THE RESPONDENT also states as above "easy access to other buildings"

> DURING THE TRIAL, IT WAS THE THEORY OF THE STATE THAT PETITIONER AND OTHERS HAD USED THE 719 COMMON STREET BUILDING AS A BASIS OF OPERATION IN ORDER TO BURGLARIZE THE SAID VARIETY STAG BAR ON THE 16TH. OF AUGUST 1958 AND THAT PETITIONER AND OTHERS WERE ALSO PLANNING TO BURGLARIZE OTHER BUSINESS ESTABLISHMENTS WITHIN THIS SAME BLOCK.

THE RESPONDENT now seems to have applied this same theory and has submitted it to this Honorable Court in their Brief to the Court i.e., on Page 4 of their Brief.

PETITIONER HERE CONTENDS here that there was no evidence adduced during the entire course of the trial of this cause that shows that Petitioner or any of the others charged with this case at bar had ever been at the 719 Common Street building prior to August 24th. 1958, or that the 719 Common Street premises had been used by those charged with the simple burglary of 134 Carondelet Street on the night of 16th. of August 1958.

A WITNESS FOR THE STATE had testified during the course of the trial that certain police had gone into the 719 Common Street building shortly after the burglary of the Variety Stag Bar on Carondelet Street (No. 134) and at that time there was no evidence to show that that building had been used previously as a base of operation for the crime charged in the case at bar. Petitioner here asks the Court to read the following excerpts that pertains to the examination of the 719 Common Street Building as described by Petitioner.

48 Direct Examination,

POLICE MAJOR, WILLIAM J. Mc. NAMARA,
Case 161-524 * Section "E" Tr. 184-185

By Mr. Zibilich:

Q. Do you know where Gustafson and Viguirie did in fact arrest La Caze and Linkletter?

A. Yes sir, they did.

Q. Did they bring them back in your company?

A. Brought them back to 719 Common Street at my direction.

Q. Where were you?

A. On the third floor of the building 719 Common Street.

Q. How did you get in this building?

A. With a duplicate key we had made when Viguirie and Vogt visited it previously.

Another Witness For the State, Sgt. Cornelius Drumm. who was an expert Chart maker produced a chart that was made by him and the State had used this Chart as evidence against Petitioner and marked it as S-30. The purpose of the chart was to show exactly how Petitioner and others had used the 719 Common Street building as a basis of operation to conduct the said simple burglary as alleged by the State in this cause.

By The Court:
Tr. 228.

Gentlemen, both sides have agreed this gentleman is an expert in his particular field.

Cross Examination, Tr. 233 Case No. 161-524, Section "E"
SGT. CORNELIUS DRUMM,

By Mr. Byrnes:

Q. In other words to get from 719 you would have to go down to this sky-light by the end of the roof, and go to Kolb's restaurant, and you would have to go through a window at Kolb's and go over the Whitney Bank, who's roof you are not sure how high it is?

A. That is right.

ANOTHER WITNESS FOR THE STATE, Mr. C. C. Mills who identified himself as the owner of Kolb's Restaurant gave testimony at the trial of this cause concerning the alleged burglary of that place as Sgt. Drumm had claimed in the excerpts shown above, as following;

Cross Examination, Tr. 218 Case No. 161-524, Section "E"
MR. C. C. MILLS,

By Mr. Byrnes:

Q. Mr. Mills, Kolb's was never burglarized in August 1958, no one broke into Kolb's and took any money?

A. Not in August, No Sir.

49 Q. In August 1958?

A. Not in August.

THE RESPONDENT in order to substantiate their contention that;

". . . the third floor at 719 Common Street permitted easy access to other buildings in that square . . ."

as the Respondent has shown to this Honorable Court on Page 4 of their Brief, would have to show this Court the same excerpts as Petitioner now shows here.

HOWEVER, Petitioner would like to point out to this Honorable Court that the Respondent does not claim that Petitioner or the others charged had ever used the so called *"easy access to the other buildings in that square"*, such as is said in their Brief on Page 4.

ANOTHER WITNESS FOR THE STATE, Miss Dorthy Ettinger had testified in Court that she had seen three men, *in plain view*, at the rear part of the 719 Common Street building, the night was August 16, 1958, after she had seen the three men and had spoken to them, the police were called. The police came later on that night and could not find anything wrong. One point Miss Ettinger brought out during the trial was the fact that she could not indentify any of those on trial or accused of the crime as those persons that she saw on a roof the night of August 16, 1958. Petitioner here asks the Honorable Court to read excerpts of Miss Ettinger;

Direct Examination, Tr. 212, Case No. 161-524, Section "E"
MISS DORTHY ETTINGER,

By Mr. Zibilich:

A. I got up on a chair and looked out the window. I couldn't believe it was true. There were three men on the side roof. I didn't know what to do and she said in front of me to get off of it. So they came out to the edge of the roof in plain view and started pounding on some pipes to make us believe they were repairing something on the building.

For A Second Time in the Respondent's Brief to this Honorable Court they (on pages 3 and 4) point out the fact that;

". . . it was upon the roof of this building that the officers found the burglary equipment and tools above mentioned . . ."

If the Police have found any burglary equipment on any such roof top such as the Respondent points out to this Honorable Court, then your Petitioner has never been confronted with this evidence in a Court of Law or otherwise. Therefore Petitioner contends that this type of evidence has no place in the present case and is entirely out of order.

50 The Respondent, on Page 4 of their Brief go on to say as follows;

". . . It will be noted that the arrest of Linkletter and La Caze as they left the premises at 719 Common Street, was without warrant and the search of his person, at the time of his arrest, his apartment and place of business on Magazine Street, were also made without a search warrant . . ."

Petitioner Here Would Like to Point Out the Facts as Following;

1. As a result of the above described arrest of the Respondent, Petitioner was charged with four crimes involving New Orleans burglaries.

2. One of the bookings was for the said simple burglary of the crime of this cause, namely, Variety Stag Bar, 134 Carondelet Street.

3. During the described searches and seizures that the Respondent speaks of above shown, the Police had seized at least a truckload of what they termed as evidence.

4. None of the so called evidence was stolen or ever claimed to have been by anyone.

5. Petitioner had been in jail for three days and during this time the police had gone to the District Attorney with all of the articles that they had seized during their searches and seizures as the Respondent has shown this Honorable Court. The District Attorney would not accept any of the four charges that Petitioner had been booked with on August 24, 1958.

6. After 5 days detention at the police precinct, there was a new and different charge placed against your Petitioner and three others. This new charge is now more than three or four years old (No. 161-357 Section "H") and nobody has ever been called up for trial on this charge.

7. Under NOPD #59776 (New Orleans Police) this record will reflect that it was not until the date of September 12, 1958, that Petitioner was arrested for the crime of this cause.

8. The Police Officers that arrested Petitioner on September 12, 1958 were never called into Court to testify and they are unknown to Petitioner, they were other police than were called by the State as witnesses.

PETITIONER WISHES TO BRING TO THE ATTENTION OF THIS HONORABLE COURT THE FACT THAT THE RESPONDENT ONLY SPEAKS OF AN ARREST THAT HAD OCCURRED ON THE 24th. AUGUST 1958, AND THAT THERE IS NO MENTION OF ANY ARREST THAT THE POLICE MADE ON THE SEPTEMBER 12, 1958 DATE. PETITIONER AT THIS TIME SUBMITS TO THE HONORABLE COURT A LETTER FROM THE NEW ORLEANS POLICE DEPARTMENT AND MARKS THIS SAME LETTER AS APPENDAGE

"C" AND PETITIONER ASKS THE COURT TO EXAMINE SAME. PETITIONER CONTENDS THAT BOTH OF THESE MENTIONED ARRESTS WERE ILLEGAL ARRESTS.

THE RESPONDENT on Page 4 of their Brief state the following;

". . . The theory of the State was that Linkletter,
51 Soldani, La Caze and Ruth Morrison committed the crime of burglary after having conspired to burglarize several buildings located within the square and block surrounded oy St. Charles, Canal, Common and Carondelet Streets . . ."

THE STATE, in support of its contention and theory that Petitioner had conspired to burglarize several places in the square as the Respondent states as shown above, they brought into Court several witnesses to testify. Your Petitioner DENIES here that he had Conspired with anyone to burglarize any places whatsoever.

PETITIONER WOULD LIKE TO HAVE THIS HONORABLE COURT READ THE FOLLOWING EXCERPTS OF THE VARIOUS STATE WITNESSES THAT WERE BROUGHT INTO COURT DURING THE TRIAL OF THIS CAUSE IN SUPPORT OF THIS SAME CONTENTION OF THE STATE AT THE TIME OF THE TRIAL, WHICH TESTIMONY FOLLOWS;

MR. CHARLES MUMPHREY, Case No. 161-524, Section "E"

Direct Examination, Tr. 224,

By Mr. Zibilich:

Q. Did you receive during the month of August, 1958 any unusual phone calls?

A. Yes Sir, I received several unusual phone calls.

Q. What was the nature of the calls?

A. Reqresting the time we opened the store and closed it, and that act wasn't like a regular customer, most of our customers know what time we close. We have a sign posted in the store when we close.

Tr. 225-226
Cross Examination,

By Mr. Byrnes:

Q. Did you receive any calls yourself?
A. Yes, I received one more in the afternoon.
Q. What month was that?
A. That was in August.
Q. Latter part?
A. In the first part of August, I think it was around that time.
Q. That is all you know personally of your own knowledge that you received one call is that correct?
A. Yes, but like I said . . .
Q. You yourself?
A. Yes I received it.
Q. The call was for what?
A. Regarding when we opened and when we closed the store.
Q. Did you report that to the police?
A. No, I didn't report it.
Q. Didn't think it was unusual?
A. Didn't think it was unusual, thought it might be customers asking for it

52 Another Witness For the State in support of their Theory that Petitioner was conspiring to burglarize various places in the block which has been submitted to this Honorable Court in the Respondent's Brief at the lower part of Page 4, is as follows;

Under Direct Examination, Case No. 161-524, Section "E"

MR. C. C. MILLS,

By Mr. Zibilich:

Q. I want to direct your attention to the month of August, 1958 and ask you whether or not you received any unusual phone calls?
A. Yes Sir.
Q. What was . . .

By Mr. Byrnes:

Of course, we are going to object to this line of questioning unless it is linked up with either of these two defendants.

Examination Resumed By Mr. Zibilich:

Q. What was the nature of the calls?

A. A great many calls asking for different people in the building, both on the apartment number and the numbers of the restaurant which we have an extension in the apartment.

Q. Have you received any such calls since September?

A. No sir.

Q. Had you received any before August?

A. No Sir.

Cross Examination,

By Mr. Byrnes

Q. You say they asked for people, these phone calls they ask for people?

A. Yes Sir.

Q. What people?

A. Police people, sergeants and lieutenants.

Page 219.

Q. And they were asking for police people and sergeants of that kind?

A. Yes Sir.

Q. And it is generally known that Kolb's is closed on Sunday?

A. It is so advertised.

Q. You advertise it?

A. Yes Sir.

Q. So there would hardly be any police people there on Sunday.

A. There were that Sunday.

Q. When?

A. Oh, practically all day.

Q. That is all Sir.

53 THE EXCERPTS SHOWN HERE of Mr. Charles Mumphrey and that of Mr. C. C. Mills are taken from the trial Court in this case (No. 161-524) and the testimony is typical of all evidence adduced by the State in order to show that there was an conspiracy being conducted by Petitioner and others. The Respondent alleges this THEORY of the State on Page 4 of their Brief to this Honorable Court.

Petitioner takes note that the Respondent says that Soldani and Ruth Morrison were part of the so alleged conspiracy.

> PETITIONER WOULD LIKE TO POINT OUT HERE THAT DURING THE MONTH OF OCTOBER 1958 A PRELIMINARY HEARING WAS HELD CONCERNING THIS SO CALLED CONSPIRACY THAT THE RESPONDENT NOW ALLEGES BEFORE THIS COURT, THE HEARING WAS IN THE ORLEANS PARISH CRIMINAL DISTRICT COURT, IN SECTION "H" CASE NO. 161-357.
>
> DURING THE ABOVE MENTIONED HEARING IN SECTION "H" THE CONSPIRACY CHARGES WERE DROPPED OUTRIGHT AGAINST BOTH JOHN SOLDANI AND AGAINST RUTH MORRISON AND PETITIONER AND LA CAZE WERE HELD FOR TRIAL, BUT NOBODY HAS EVER BEEN CALLED UP FOR TRIAL ON THIS CASE.

JOHN SOLDANI is the same person who was later convicted with Petitioner for the crime of this cause in Section "E", Case No. 161-524.

> NONE OF THE STATE WITNESSES THAT WERE BROUGHT IN TO SHOW THAT PETITIONER HAD PLANNED TO BURGLARIZE OTHER PLACES IN THE BLOCK THAT THE RESPONDENT MENTIONS IN THEIR BRIEF HAD EVER CLAIMED THAT THEY HAD EVER SEEN PETITIONER OR THAT HE WAS CONNECTED WITH THE UNUSUAL OR SUSPICIOUS PHONE CALLS THAT THEY HAD RECEIVED DURING THE MONTH OF AUGUST 1958, AND THEY HAD NOT CLAIMED THAT PETITIONER WAS IN ANY OTHER WAY CONNECTED WITH OTHER UNUSUAL HAPPENINGS THAT HAD OCCURRED DURING THE MONTH OF AUGUST 1958.

HOWEVER, another witness for the State, one John Schwab, who gave testimony on Tr. pps. 219, 220, 221, 222, and 223, who identified himself as the acting manager of the Elk's Club located at 705 Common Street. Schwab's testimony was to the effect that SOLDANI walked up the stairs of the Elk's Club, wanted him to open up the safe

and demanded money. When Schwab told him no, Soldani left. Schwab further testified that the man had no weapon and no mask and said all he wanted was money.

The Soldani mentioned above is the same person that was tried and convicted with Petitioner at the trial of this cause, No. 161-524.

When Soldani's attorney (Sam Monk Zelden) took the present case up on appeal (No. 44,939) to the Louisiana State Supreme Court, he made the following plea before that Court;

> "The testimony of Mr. Schwab as aforestated, set forth an absolutely ridiculous statement which is impossible to believe and what has it to do with the illegal entry of the said premises 134 Carondelet Street?"

PETITIONER would like to point out the fact that there were never any criminal charges made on this alleged attempted robbery.

54 THE LOUISIANA STATE SUPREME COURT when the case now at Bar went up on appeal (Docket No. 44,939), declared that the "John Schwab" story was what they termed as part of a "TOTAL LACK OF EVIDENCE" and the State Supreme Court ordered the decision of the trial Court be reversed and the said John Soldani to be released, and shortly thereafter Soldani was released.

Petitioner CONTENDS that the three witnesses shown here by him, is the ONLY evidence that the Respondent could show to substantiate their claim as they have presented to this Honorable Court, that those charged with the crime of this cause had conspired to burglarize other business establishments within the said city block as the Respondent now alleges on Page 4 of their Brief to this Court.

Petitioner CONTENDS that the type of evidence the Respondent relies on when they present their THEORY to this Honorable Court when they allege that Petitioner and others had conspired to burglarize other business places in the city block that they mentioned in their Brief, are of suspicions, innuendoes, faint and far flung circumstances. This is what the Respondent now expects this Honorable Court to accept now as evidence against Petitioner to uphold their THEORY, i.e., that Petitioner and others had con-

spired to burglarize other buildings in the said block as alleged in their Brief to this Court.

Petitioner further CONTENDS that this sort of evidence does not now belong before this Honorable Court and Petitioner asks the Court not to be influenced by the alleged acts of conspiracy as said and mentioned by the Respondent throughout their Brief.

IN THE RESPONDENT'S Brief at the bottom of Page 4 and the top of Page 5 it is stated as following;

> "During the trial, Linkletter and Soldani, all of the evidence gathered at the scene of the burglary of the Variety Stag Bar, the evidence recovered on the roof of the third floor of the building at 719 Common Street, evidence recovered from the person of Linkletter, that recovered from his apartment at 930 Poydras Street, and that obtained at his place of business at 4516 Magazine Street, was introduced in evidence."

Petitioner would like to have the Honorable Court read the following points concerning the above shown statement by the Respondent in their Brief.

1. The evidence gathered at the scene of the burglary had never been shown to have belonged to Petitioner or belonging to any others that were charged with the crime of this cause, No. 161-524.

2. Petitioner has never at any time been confronted with any evidence that the police may have recovered from the rooftop of the said 719 Common Street Building.

55 3. The evidence recovered from Petitioner and that from his home was not stolen or contrabrand goods and this was all seized during an illegal arrest and seizure during the week of August 24, 1958 and when this evidence was presented to the District Attorney during this week, there were no charges accepted for the crime of this cause, even though the police had made such a request for the charge of this crime to the District Attorney, Petitioner was released and was later charged on the 12th. of September 1958. See Appendage "c".

4. All evidence obtained by the police, oral or material, was later declared to have been a "TOTAL LACK OF EVIDENCE" i.e., evidence seized from the said business establishment of Petitioner and the other person on trial (John Soldani) with Petitioner was ordered discharged and further, all the paint that was seized from the business est. was rejected as evidence by the trial Judge in case No. 161-524, Section "E", the trial of this cause.

DUE TO THE CIRCUMSTANCES surrounding the case at Bar, Petitioner contends that he has been denied his Constitutional rights under the 4th. and 5th. Amendments and further, has been denied Due Process of Law as expressed under the 14th. Amendment to the United States Constitution.

LAW AND ARGUMENT

THE RESPONDENT CLAIMS on Page 5 of their Brief that under;

L.S.A. Title 15:60, that ". . . under the circumstances of the present case as outlined in the statement of facts above presented, there can be no doubt of the fact that the arresting officers had reasonable cause within the meaning of L.R.S. 15:60 and probable cause within the meaning of the 4th. Amendment of the U.S. Constitution, to believe that a felony had been committed and that Victor Linkletter was a prime suspect. Hence, his arrest without a warrant was legal and valid."

IN LIGHT OF THE FOREGOING FACTS which petitioner has humbly submitted to this Honorable Court as TRUE FACTS, mostly taken from the trial and other Court excerpts, which are in answer to the MISTAKEN FACTS which the Respondent has presented to this Court concerning the case at Bar, and upon these contended mistaken facts, the Respondent now claims that the police and other State officials had reasonable cause under L.R.S. 15:60 and probable cause under the 4th. Amendment to believe that Petitioner

had committed the crime of this cause and a legal and valid arrest was made accordingly.

PETITIONER MUST REJECT the Respondent's contention that there was a legal and valid arrest in the case at Bar, and asks this Honorable Court to determine for itself, whether or not Petitioner's Constitutional rights were violated and Petitioner asks that this be done in light of all the evidence and facts pertaining to the present case.

56 THE RESPONDENT has presented to this Honorable Court as FACT, various statements, which Petitioner contends that there has never been any testimony adduced during the entire course of the case at Bar to substantiate the claims of the Respondent, as your Petitioner has shown thus far in this Brief.

The RESPONDENT must have been missinformed as to the TRUE FACTS pertaining to the present case, and Petitioner asks this Honorable Court to please give the Respondent an opportunity to look further into the present case so that they would be able to ascertain the TRUE FACTS, which Petitioner feels that when realized, that even they will not condone the actions of the persons involved.

PETITIONER CONTENDS that in light of the true facts as presented herein by petitioner, that there would be no lawful arrest and reasonable search and seizure as the Respondent claims on Page 5 and 6 of their Brief to dismiss and that Petiitoner shows FACTS in this Brief that can not be truly disputed by anyone.

THE RESPONDENT in their statement of facts to this Honorable Court has presented as FACTS, statements which are untrue almost in their entirety, and therefore Petitioner contends that Draper v. United States, 79 S. Ct. 333; and United States v. Rabinowitz, 70 S. Ct. 430; Angello v. United States, 46 S. Ct. 4 * * * as shown on Page 6 of Respondent's brief to this Honorable Court are NOT applicable as far as Petitioner's case at Bar is concerned.

THE FOURTH AMENDMENT to the Constitution does guarantee the right of the Citizen to be free against "Unreasonable Searches And Seizures", Petitioner contends that only through a illegal arrest, search and seizure was how the State of Louisiana able to mount the semblance of

a case against Petitioner and gain a conviction as they did in the case at Bar.

". . . arrests on suspicion are not Constitutional, Henry v. United States, 361 U.S. 98.

THE RESPONDENT has thus far only talked about an arrest which had occurred on August 24, 1958, and attempts to pass this illegal arrest off to this Court as the legal arrest connected with the case at Bar. As a result of this August 24th. arrest, the District Attorney had refused all charges that were connected with that arrest when first presented to him and 6 days later a new and different charge was placed against Petitioner which is now about 4 years old and nobody has been called up for trial on that charge, Case No. 161-357, in Section "H" Orleans Parish Criminal District Court. The crime of the present cause was one of the District Attorney rejected charges, i.e., simple burglary of Variety Stag Bar, 134 Carondelet Street, New Orleans Louisiana.

57 UNDER DATE OF SEPTEMBER 12, 1958, Petitioner and Ruth Morrison only, were arrested from Petitioner's business establishment located at 4516 Magazine Street, and were then taken to the first district police station and booked with the crime of this cause. See appendage "C" and refers to N. O. P. D. #59776, this arrest occurred about 19 days after the police had conducted all of the searches and seizures that the Respondent mentions in their Brief to this Honorable Court.

PETITIONER asks the Honorable Court to read the following excerpts taken from the trial of this cause No. 161-524, Section "E". The statements of this witness, who it appears from the trial Court records, had charge of the various police actions pertaining to the mentioned arrest of Petitioner on August 24, 1958. The witness here claims that the August 24th. arrest had nothing to do with the crime of this cause, i.e. as below.

On Re-Direct Examination,

MAJOR WILLIAM J. McNAMARA,

Tr. 191

By Mr. Zibilich:

Q. The other case we are talking about do you recall what court that was in?
A. Judge Bagert's Section.
Q. Was it a jury case?
A. No sir, it was not.
Q. What was the particular charge if you recall?
A. Conspiracy to burglarize Kolb's Restaurant.
Q. On what date?
A. August 24, 1958.
Q. Had nothing to do with the Variety Stag Bar?
A. No sir, we didn't tie that in into it later.

THE CONSPIRACY CHARGE mentioned above by Major McNamara was never brought to trial. The charges were dropped altogether against two of those charged, (John Soldani and Ruth Morrison) Soldani was the other person convicted with Petitioner for the crime of this cause. The above mentioned Conspiracy was not placed against Petitioner on the day of August 24, 1958, after Petitioner had remained in jail for 5 days after August 24th. had the herein mentioned conspiracy charge been placed against Petitioner and the others involved in this case.

"An officer arresting without a warrant cannot justify his action in holding or detaining a prisoner for an unreasonable time before obtaining a warrant upon the grounds that such delay was necessary in order to investigate the case and procure evidence against the accused," Motovia v. Hult, 123 N. E. 2nd. 893.

58 UNDER DATE OF AUGUST 24, 1958, Petitioner was arrested and then taken to the 1st. District Police Station and one of the charges that Petitioner was booked with was burglary of the 719 Common Street premises. MR. JOHN A. HARRIS who appeared at the police line-up the following day had told the police that there had been no

burglary of his building and that the person arrested with Petitioner had been the person that rented the said 719 Common Street building, i.e., Joseph La Caze.

Officer Lawrence Viguirie the officer that had arrested Petitioner on August 24, 1958 could not identify the things which he and other police had observed Petitioner and La Caze carry into the 719 Common Street bldg. After the police had entered this building alone without Petitioner and La Caze, they called the discovered tools and equipment burglar tools. See Page 10 and 11 of Appendage "A".

Cross Examination—Case No. 161-357, Section "H"

OFFICE LAWRENCE VIGUIRIE,

Page 10 and 11.

By Mr. Zelden:

Q. you then stated on Sunday, somewhere between 2:00 and 2:10 you saw Jake La Caze and Linkletter take some objects out of the trunk and walk into the building?

A. Yes, sir.

Q. Could you see what they carried?

A. Saw two objects wrapped in sacks, several boxes.

Q. You don't know what it was?

A. No, sir.

Q. You can identify it?

A. No sir.

The Above Shown Testimony of officer Lawrence Viguirie shows that he did not know what Petitioner and La Caze had carried into the 719 Common Street building until the police had entered the building alone and then "discovered" what was alleged by the police to have been burglar tools and equipment.

"Unlawful arrest cannot be the foundation of a lawful search, nor information obtained by an unlawful search furnish the basis for a lawful arrest; and where an arrest or search is unlawful in the beginning, it is not made lawful by what afterwards takes place." Enlow v. State, N. E. 2nd. 250.

PETITIONER CONTENDS that a search and seizure was made of his person during such a time when an unlawful arrest was being committed against him and during such time when the police were conducting an unlawful search and seizure of the premises 719 Common Street.

59 WHAT RIGHT DID THE POLICE HAVE BY TAKING IT ON THEIR OWN BY HAVING A KEY MADE AND SEARCHING THE 719 COMMON STREET BUILDING, NOT ONCE, BUT TWICE, AND WITHOUT A SEARCH WARRANT?

IN THE CASE AT BAR a witness for the State describes the search of Petitioner and the testimony as follows shows how the police had entered the said 719 Common Street Building.

Direct Examination, Case No. 161-524, Section "E"

POLICE MAJOR, WILLIAM J. McNAMARA,

Tr. 184-185.

By Mr. Zibilich:

Q. Do you know where Gustafson and Viguirie did in fact arrest La Caze and Linkletter?

A. Yes Sir, they did.

Q. Did they bring them back in your company?

A. Brought them back to 719 Common Street at my direction.

Q. Where were you?

A. On the third floor of the building 719 Common Street.

Q. How did you get in this building?

A. With a duplicate key we had made when Viguirie and Vogt visited it previously.

Q. Did you make any search of Linkletter or take anything off his person? I mean at that particular time?

A. There were some keys on a chain that were taken. I don't remember whether I took them or somebody else.

THE ABOVE MENTIONED SEIZED KEYS WERE USED AS EVIDENCE DURING THE TRIAL OF THIS CAUSE AND PETITIONER WAS PREJUDICED THEREBY.

". . . An officer making an arrest has authority to search the person of his prisoner, but a search is

justifiable only as an incident to a lawful arrest. If the arrest is unlawful the search is also unlawful." Conningham v. Baker, 104 ALA, 160 16 So. 68, 53 A.S.R. 27.

". . . Belief however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant and such searches are held unlawful not withstanding facts unquestionably showing probable cause. . . ." Angelo v. United States, 269 U. S. 20 (1925) 292, 295.

THE OFFICIAL records of the New Orleans Police Department reflect that Petitioner was not arrested with the crime of this cause until September 12, 1958, and all of the searches and seizures the Respondent states in their Brief are those searches that occured about 19 days before the September 12, arrest, See Appendage "C".

". . . It is also settled law that where the search is incidental to an arrest, the arrest, must occur before the search, and the search must be completed at the time of arrest. People v. Conway, 225 Mich. 152, 195 N.W. 679 (1923).

60 ". . . A search of the person is not lawful if its purpose is to discover grounds as yet unknown for an arrest, and in such a situation the search does not become lawful because of what is found. . . ." Johnson v. United States, 333 U. S. 10 (1948).

". . . And if a suspect, arrested without a warrant or without the existence of probable cause, is searched and articles implicating him in crime are found, they may not be used in federal court. . . ." Weeks v. United States, 232, U. S. 383.

WHEN THE ARREST AND SEARCH of Petitioner was conducted by the police on August 24, 1958, petitioner was not in the commission of any crime, the arrest occured ONLY after it became apparant that the petitioner was not going to commit any crime such as the police had suspected, and therefore the police had no grounds for a legal arrest

at that time and such being the case, the arrest and seizure of the set of keys should not become lawful.

On August 24, 1958, four charges were placed against Petitioner and others, none of these charges were accepted by the District Attorney when they were presented to him during the week of August 24th., 1958. The crime alleged of this cause was to have occured on August 16, 1958, at 134 Carondelet Street, New Orleans, which is on a different Street and at another address than 719 Common Street.

The Police Went Alone Without Petitioner on August 24, 1958 and then conducted a search of his home and seized the personal papers and belongings of Petitioner.

The Home of Petitioner was 6 to 7 city blocks from where the August 24th. arrest of Petitioner had occured.

The Police knew for a period of two days before the August 24th. arrest that Petitioner had resided at the 930 Poryras Street premises and had ample time to obtain a search warrant if they so desired.

A Witness for the State made the following remarks during the trial of this cause, and Petitioner asks the Honorable Court to read the excerpts;

POLICE MAJOR, WILLIAM J. McNAMARA,

Direct Examination,

Tr. 186-187.

By Mr. Zibilich:

> Q. What was found in your presence?
>
> A. In the apartment was taken out a pair of crepe sole shoes, a myriad of stuff came out of a drawer which according to Miss Morrison . . .
>
> Q. Don't say what she said.
>
> A. We took a lot of personal papers and a small screwdriver, a whole pillow slip came out of one of the drawers which we took out. (Petitioner's Underscore)

61 The Personal Papers That Were Seized by Police from Petitioner's home on August 24th. were used as evidence during the trial of this cause and Petitioner was prejudiced thereby.

All Property That Was Seized from the home of Petitioner was his own personal property and personal papers,

there was no stolen goods or contraband things found at the home of Petitioner, the things seized were used during the trial of this cause and Petitioner was prejudiced thereby.

THE PERSONAL PAPERS that were seized and used by the State as evidence were marked by the State as S-32, and Petitioner was prejudiced thereby.

> "... But it has been held that authority to search a house or place of business incidental to a lawful arrest is certainly not greater than that conferred by a search warrant. It follows that private papers wanted solely as evidence which could not be seized even under a search warrant issued upon ample evidence MAY NOT BE TAKEN AS INCIDENTAL TO AN ARREST ..."
>
> (Petitioner's Underscore)
> United States v. Lefkowitz, 285 U.S. 452 (1932).

THE TRIAL COURT allowed over the objection of the attorney for Petitioner, the personal property and personal papers of Petitioner to go into evidence, the personal paper used and marked by the State as S-32 was a card with writings on its reverse side which were ascribed to Petitioner by a handwriting expert who gave testimony for the State in connection with this card (Tec. Warren M. Forrest) and Petitioner did not then and does not now challenge this fact.

THE STATES broad insinuations and innuendoes and implications as it presented this (Marked S-32) card in evidence, was manifestly designed to show the jury that great evil was attached to the card, i.e., that Petitioner had listed names and addresses on the card as prospective victims of burglary. Petitioner deems this prejudicial misconduct in a flagrant degree and reversible error, per se. BUT THE SPECIFIC OBJECTION TO THIS, TAKEN NOW, IS THE INTRODUCTION OF THIS CARD INTO EVIDENCE OVER THE OBJECTION OF PETITIONER'S ATTORNEY AND PETITIONER WAS PREJUDICED THEREBY, THIS AMOUNTED TO COMPELLING PETITIONER TO TESTIFY AGAINST HIMSELF AND IN DIRECT VIOLATION OF THE 5TH. AMENDMENT TO THE UNITED STATES CONSTITUTION.

". . . but he may not seize "Merely evidentiary materials" that is, materials which are merely evidence of crime and not things in themselves illegal . . ." Harris v. United States, 331 U.S. 145, 154 (1947).

62 ". . . Use in evidence, of papers seized in a search unconstitutional under Amendment four (4), is in effect to compel defendant to to become a witness against himself. Gouled v. United States, 225, U.S. (1921), 292, 295.

". . . A search and seizure of private papers in effect compels a man to testify against himself in violation of the Fifth Amendment privilege against self-incrimination, and therefore such a search and seizure is unreasonable, and repugnant to the Fourth Amendment. Boyd v. United States, 116 U.S. 616, (1886).

". . . There is a Constitutional difference between a search for things which are themselves prohibited such as stolen good,s and a search for books and papers sought as evidence, the latter being illegal . . ." Boyd, Supra.

On or About August 25th. 1958, there was a second search and seizure conducted at the home of Petitioner (930 Poydras Street New Orleans, La.) in the presence of Petitioner, the seized things were taken over protest and were later used as evidence during the trial of this cause, (No. 161-524) The Respondent on the lower part of Page 3 of their Brief to this Court admit to this second search and seizure that was made, the part of the evidence that was seized and used during the trial was two cans of paint marked by the State as S-42 and S-43, these were used as evidence over the objection of Petitioner's attorney, and Petitioner was prejudiced thereby.

". . . It is also settled law that where the search is incidental to an arrest, the arrest, must occur before the search and the search must be completed at the time of arrest . . ." People v. Conway, 225 Mich. 152, 195 N.W. 679 (1923).

In the Case at Bar the searches and seizures were conducted about 19 Days before the arrest of Petitioner

for the crime of this cause, i.e., Simple Burglary of Variety Stag Bar, 134 Carondelet Street, New Orleans. The searches were on and about August 24th. 1958, and the arrest was on September 12, 1958. See Appendage "C".

THE RESPONDENT on Page 3 of their Brief admit that there was a search and seizure of Petitioner's business establishment at 4516 Magazine Street, on or about August 25th. 1958.

THERE WERE ACTUALLY TWO searches conducted at the said business establishment and during the first search various articles were seized and were later introduced into evidnece (Search of August 24.) during the trial of this cause, ALL OF THE MATERIAL EVIDENCE THAT THE POLICE HAD SEIZED FROM THE SAID BUSINESS ESTABLISHMENT, WAS REJECTED BY THE TRIAL JUDGE AS NOT BEING RELEVANT TO THE CASE.

63 HOWEVER, three or more of the Police that had conducted the searches and seizures of the said business establishment gave ORAL TESTIMONY AS EVIDENCE, this testimony pertained to things they had seen during the said search and Petitioner's attorney had objected to the use as such during the trial of this cause, however, the trial judge permitted their testimony to go to the jury and Petitioner was prejudiced thereby.

WHEN THE CASE OF THIS CAUSE (Docket No. 44,939 State Supreme Court) went up on appeal, the Louisiana State Supreme Court declared that all evidence given in connection with the said business establishment at 4516 Magazine Street, was a "TOTAL LACK OF EVIDENCE" and ordered the other person that was on trial and convicted with Petitioner (John Soldani) to be discharged.

HOWEVER, this same evidence was used against Petitioner before the jury over the protest of Petitioner's Attorney, and Petitioner was prejudiced thereby.

It is the contention of Petitioner that this makes the search and seizure of the 4516 Magazine Street business an unreasonable search and seizure under the 4th. Amendment.

WHAT CAN BE more unreasonable than to allow the said seized evidence from the business establishment to stand against Petitioner and at the same time to be declared as a "TOTAL LACK OF EVIDENCE AGAINST THE OTHER CONVICTED

PARTY INVOLVED"? The said Company was about 45 city blocks from the scene of the crime and in an entirely different part of the city. The oral evidence used against both Petitioner and John Soldani that was obtained by the police from the Company had NOTHING to do with the premises 134 Carondelet Street, the place of the said crime of this cause, yet it was used as evidence during the trial and Petitioner was prejudiced thereby.

PETITIONER CONTENDS THAT IT WAS UNFAIR AND AGAINST THE CONSTITUTIONAL RIGHTS OF PETITIONER TO HAVE USED SUCH A TYPE OF EVIDENCE AS PETITIONER HAS DESCRIBED HERE.

PETITIONER went into detail on this matter in his allegations starting on Page 15 in his original petition for a writ of habeas Corpus to this Honorable Court, and Petitioner urges this Court to read over paragraph IV of the said habeas corpus petition so that the subject matter may be fully understood.

64 ". . . . It is also established that the Fourteenth Amendment forbids, "Fundamental Unfairness in the use of evidence whether true or false . . ." Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S. Ct. 280, 290, L. Ed. 166.

". . . Witnesses may not testify as to what they saw during an illegal search . . ." Amos v. United States, 225 U.S. 313 (1921).

DURING EACH AND EVERY SEARCH by the police they seized any and everything they could lay their hands on, hauled these things away with them, sorted through the various seized things, and only brought things into Court as evidence that could create a suspicion before the jury.

Even at the 719 Common Street building the Police did not bring into Court as evidence, the paint, paint brushes and other things such as a Manila folder, which contained plans for work to be done at the 719 Common Street building. A police officer during the trial had said that he saw this folder, but it was not among the evidence at the trial. The only things brought into Court were the suspicious things.

PART OF THE PERSONAL PAPERS that the police had seized from the dresser drawer of Petitioner at his home during the police search on August 24th, were personal letters, some of these letters were taken and shown to the Mayor of New Orleans (Mayor Morrison), and as a result of this Police action, Leonard A. Calcagno, who was then the attorney for Petitioner was more or less forced to resign from the case, this attorney then went out and hired Mr. Bentley Byrnes to defend Petitioner. Leonard A. Calcagno was also a part time City Attorney and if he had not dropped the case of Petitioner he would have been fired. He was permitted to handle other criminal cases and only had to drop the case of Petitioner.

THE SAID LETTERS THAT WERE TAKEN by the police to the Mayor were from Petitioner's 12 year old Son who was living with his Mother in California and the letters had been sent to Petitioner c/o Leonard A. Calcagno at his Law office.

> "... The goods to be seized under a search warrant must be described with such certainty that they may be identified and with such particularity that the officer charged with the execution of the warrant will be left with no descretion respecting the property ..." People v. Sovetsky, 342, Ill. 583, 588, 175 N.E. 844, 846 (1931).

65 AT THE LOWER PART OF THE RESPONDENT'S BRIEF on Page 7, it states as following;

> "... Petitioner takes the position that since the evidence was inadmissible as to Soldani, same should be inadmissible as to him ..."

PETITIONER CONTENDS that no answer is required by him as to the above shown statement on Page 7 of their Brief.

THE ISSUE the Respondent speaks of is not before this Honorable Court at this time, it has not been any part of the allegations and Contentions in the original petition for a writ of habeas corpus as filed in this Court.

PETITIONER DOES NOT ASK this Honorable Court to hear and consider this question at this time.

THE REFERENCE made in Petitioner's habeas corpus petition to this court was pertaining to the search and seizure of the said business establishment of Petitioner. Here the

jury had heard evidence against Petitioner in connection with the said Company and all of the evidence was later declared to have been a "TOTAL LACK OF EVIDENCE" when this case went up on appeal and the other person charged and convicted had been ordered discharged. THIS WAS USED as an example by Petitioner to show this Honorable Court that the search and seizure of 4516 Magazine was an unreasonable search and seizure under the Fourth Amendment.

HOW COULD THE SEARCH of said Company be declared reasonable under any reasoning, the jury did not know that they were listening to illegal evidence! Petitioner was prejudiced by the evidence used.

CHIEF JUSTICE HUGHES once explained the underlying reason for the rule when he said:

> ". . . The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the 4th. Amendment, and this together with legislation regulating the process should be liberally construed in favor of the individual . . ." Sgro v. United States, 287, U.S. 206, 210 (1932).

CONCLUSION

In conclusion, it is submitted that the arrest of Petitioner was unlawful and that there was under the circumstances, no valid arrest and that all searches and seizures conducted by the police in this case, were, "UNREASONABLE" searches and seizures.

The rights guaranteed to Petitioner by the 4th., 5th., and 14th. Amendment to the U. S. Constitution have been violated and and Petitioner has been denied "Due Process of Law", THEREFORE, Petitioner's Application for a Writ of Habeas Corpus should be granted and a hearing given as prayed for in the original petition filed in this Honorable Court.

66

Respectfully submitted,

VICTOR LINKLETTER
Victor Linkletter, *Petitioner*

Certificate of Service

(Omitted in printing)

Duly sworn to by Victor Linkletter
jurat omitted in printing

 Appendage "B" to Petitioner's Brief, etc.

NOTATION

This is an exact copy of the Response to Petitioner's Application for Writ of Habeas Corpus which was served on Petitioner in Open Court on December 8, 1961, as docketed under No. 2711.

Petitioner had requested that the correct date be made in Paragraph 1, and the Judge, after Respondent corrected the typographical error, had the Court Clerk enter the change in the minutes of the Court. The change was from date, October 24, 1958, to August 24, 1958.

TWENTIETH JUDICIAL DISTRICT COURT
PARISH OF WEST FELICIANA
STATE OF LOUISIANA

No. 2711

STATE OF LOUISIANA, EX REL VICTOR LINKLETTER

V.

VICTOR G. WALKER, WARDEN LOUISIANA STATE PENITENTIARY

Response to Application for Writ of Habeas Corpus

NOW INTO COURT comes Victor G. Walker, Warden of the Louisiana State Penitentiary, through Jack P. F. Gremillion, Attorney General of the State of Louisiana, and other undersigned counsel, who now makes written return to realtor's petition for a writ of habeas corpus. Respondent shows that the application of petitioner contains a Statement of Facts surrounding his apprehension, detention, trial and conviction, and his various complaints thereto all of which require no answer for the reason that the

record is the best evidence thereof. Further answering realtor's petition respondent states as follows, to-wit:

1.

Answering Paragraph 1 of petitioner's "Allegations and Contentions" respondent admits that petitioner was originally arrested on October 24, 1958 and booked with the crime of simple burglary at the premises at 134 Carondelet Street in the City of New Orleans on or about August 16, 1958, and that petitioner, along with a co-defendant, was subsequently convicted of said crime, but the remaining allegations in Paragraph 1 are denied.

2.

In answer to Paragraph 2 of the "Allegations and Contentions" respondent admits that police officers searched the premises mentioned therein and obtained certain evidence which was introduced at the trial of the petitioner, but respondent denies the remaining allegations contained in said Paragraph 2.

69

3.

Respondents admits that on August 25, 1958 petitioner was taken to his home at Municipal 930 Poydras Street, New Orleans, Louisiana, and that a search was conducted therein during which certain items of evidence was seized and which were later offered in evidence at the trial, but respondent denies the remaining allegations of said Paragraph.

4.

Respondent would show that no answer is required to the allegations contained in Paragraph 4 of the petition for the reason that the evidence obtained during the search referred to therein was not admitted in evidence, hence petitioner was not prejudiced thereby.

5.

Respondent would show that the allegations contained in Paragraph 5 are mere conjecture and are purely speculative and consist entirely of opinions of the applicant

and are not matters which may be heard on a writ of habeas corpus.

6.

Respondent would show that the allegations in Paragraph 6 of the petition are argumentive, speculative and are conclusions of law all of which go to the weight of the evidence and all of which are not proper matters to be raised in a writ of habeas corpus, and therefore no further answer is required.

7.

Respondent would show that the allegations in Paragraph 7 of the petition are argumentive, speculative and are conclusions of law all of which go to the weight of the evidence and all of which are not proper matters to be raised in a writ of habeas corpus, and therefore no further answer is required.

70 Further answering respondent would show that petitioner is being held by virtue of the following, to wit:

1. Certified copy of Bill of Infomation No. 161-524, filed by the Assistant District Attorney Richard McBride, Jr., in Division "E" of the Criminal District Court in the Parish of Orleans with Minute Entries thereon showing a verdict of guilty as charged, sentence and decision of the Supreme Court of the State of Louisiana affirming the conviction and sentence of applicant herein.

2. Statement of Facts dated October 24, 1960 signed by Honorable J. Bernard Cocke, Trial Judge, and Honorable Robert J. Zibilich, Assistant District Attorney for the Parish of Orleans.

Wherefore, Respondent prays that this answer be deemed good and sufficient and that after all due delays and proceedings had, there be judgment herein in favor of respondent, Victor G. Walker, Warden of the Louisiana State Penitentiary, and against petitioner, Victor Linkletter, denying the writ of habeas corpus as prayed for,

and further rejecting any and all of relator's demands, all at relator's costs.

BY ATTORNEYS:

JACK P. F. GREMILLION
Attorney General
State of Louisiana

SCALLAN E. WALSH
Assistant Attorney General

THOMAS W. McFERRIN
Special Counsel

RICHARD DOWLING
District Attorney,
Parish of Orleans

ABRAHAM I. KLEINFELDT
Assistant District Attorney
Parish of Orleans

---

71 CERTIFICATE

I hereby certify that a copy of the foregoing Response has been personally served on relator herein by handing him a copy in Open Court on this .....day of December, 1961.

THOMAS W. McFERRIN

---

72 **Appendage "A" to Petitioner's Brief, etc.**

NOTATION

This is an exact copy of the testimony of OFFICER LAWRENCE VIGUIRIE, as copied by Petitioner from the original which is now in the possession of Petitioner. This is the Officer who arrested Petitioner originally on August 24, 1958.

This is certified to be a true and correct transcript of all testimony of this Officer by PATRICIA CHAMPAGNE, the Official Court Reporter of Section "H", Criminal District Court in and for the Parish of Orleans, State of Louisiana, from a:

Preliminary hearing held on October 10, 1958, and on October 14, 1958, in the case of State of Louisiana v. Victor Linkletter, Et al, No. 161-357.

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73 OFFICER LAWRENCE VIGUIRIE, a witness for the State, having been duly sworn, testified as follows:

Direct Examination

By Mr. Hertz:

Q. What is your full name? A. Lawrence John Viguirie.

Q. Are you presently and were you on August 21st of this year employed by the New Orleans Police Department? A. Yes, sir, I was.

Q. On about that date, did you have occasion to go to the St. Charles Hotel? A. Yes, sir, I did.

Q. When did you go to the St. Charles Hotel? A. I arrived there about ten minutes to two.

Q. What day? A. On Sunday, the 24th of August.

Q. Did you go to that hotel prior to that date? A. Yes, sir, I did.

Q. When? A. Two nights in succession; that would have been Thursday and Friday. No, Friday and Saturday nights.

Q. That would be the 22nd and the 23rd? A. It would be.

Q. What were you doing at the St. Charles Hotel on those days and nights? A. We were keeping 719 Common Street under observation.

Q. 719 Common Street? A. 710 Common Street.

Q. For what purpose? A. For anybody that might have come into this location.

Q. I show you State Exhibit, marked for identification S-1. Are you able to identify the subject matter of

74 that photograph? A. Yes, sir.

Q. What is that? A. This is 719 Common Street, the entrance on Common Street to the building.

Q. Is that here in the City of New Orleans? A. Yes, it is.

Q. Is that the entrance way which you took under observation on that day? A. Yes, sir, it is.

Q. The first day that you went there, did you see any or all of these four defendants go on those premises or approach those premises? A. The first day?

Q. Yes. A. No, sir, I didn't know the four. I saw two people go there, a man and a woman.

Q. Are you able to identify by names that man and woman? A. No, sir, not positively. This was at night when I saw the man and woman and I called downstairs to Captain Stevens. I talked to Captain Stevens on the phone, told him there was a man . . . .

By Mr. Braniff: Objection. It's hearsay.

By the Court: Objection overruled.

Examination continued by Mr. Hertz:

Q. Continue. A. I called Captain Stevens downstairs, told Captain Stevens there was a man and a woman going into this location.

Q. What time of day or night was this? A. This was at night; I would say about eight or nine o'clock.

Q. What did this man and woman do? A. Well, the man put a key in the door. From our vantage point it looked like he might have tried the key or or tried the door. Then they closed the door. The woman stood with her back towards the door, looking out towards the street. Neither one of them entered the building. They looked like they just checked the door and then they walked out on Common Street towards Carondelet Street.

Q. Did you see anyone else that night go near those premises? A. Not Friday night, no sir.

Q. What about Saturday, the next day? A. No, sir.

Q. What about Sunday, August 24th? A. Yes, sir, we did.

Q. What did you see or whom did you see, if anybody? A. We saw Jake LaCaze and Vic Linkletter go to a blue car which was parked in front of the building, a Ford, and from the trunk, they took objects out of the trunk, brought it up to the building. They went into the building, closed the door behind them, stayed in there for approximately an hour and they came out. They walked on Common Street towards St. Charles Avenue.

Q. What time was this? A. I would say it was about two o'clock; in the neighborhood of 2:00, 2:10.

Q. Did you see them, later on or anyone else later on? A. Saw them when they came out of the building.

Q. Who was this you saw, now? A. Jake LaCaze and Vic Linkletter.

Q. Did you see a third man? A. Yes, sir, I did. The third man got into the automobile, into the Ford, and drove off, drove off towards Carondelet Street on Common.

Q. Are you able to identify that third man? A. Not positively, no, sir.

76 Q. What happened next, if anything? A. When LaCaze and Linkletter came out of the building, I was in Room 466 in the St. Charles Hotel with other officers and I received instructions, Paul Gustafson and myself . . .

By Mr. Braniff: We object to that as being hearsay evidence.

By the Court: Objection sustained.

Examination Resumed by Mr. Hertz:

Q. What did you do, Officer? A. We arrested LaCaze and Linkletter.

Q. What did you do next, if anything? A. Brought them back to the—in front of the St. Charles Hotel.

Q. What else happened, if anything? A. They were later brought to 719 Common Street.

Q. What else did you do? A. After we returned from 719 Common Street, Captain Stevens, Sergeant LeBlanc and myself brought them to the First District and booked them.

Q. Did you go upstairs in 719 Common Street? A. Yes, sir.

Q. Which floor? A. Well, it would have been the second floor.

Q. The second floor? A. It would have been the top floor, the third floor. The basement floor, the second, it would have been the third floor.

Q. What did you find there? A. There was an oxygen tank, an acetelene tank, extension ladder, crow bars, burning torch, three weapons; might have been other things I don't recall.

77 Q. What did you say you put in your car? A. We put the oxygen tanks, I think we put the acete-

lene, oxygen tanks, the burning equipment, we put in our car.

Q. What did you do with them after you put them in your car? A. Brought them to the Detective Bureau and put them in the property lock-up.

Q. What else did you do, if anything? A. Marked it for evidence.

Q. Who marked it? A. Myself.

Q. Will you step down and examine these various exhibits which appear here and tell me if you are able to identify any of them and if so what? A. The oxygen and acetelene cylinders I have initialed and have stickers on them.

Q. Are those the same ones you brought down and put in your car yourself? A. Yes, sir.

Q. How about this ladder and briefcase here? Are you able to identify those? A. Yes, sir, the briefcase has the date and my name on it also. Also my name and the date on the ladder.

Q. Are you sure that is the equipment that was found on those premises? A. Yes, sir.

Q. Officer, I show you State Exhibit 6. Are you able to identify the subject matter of that photograph? A. Yes, sir.

Q. What is that? A. On our return to 719 Common Street, on the uppermost floor, this is how we found the oxygen tank and the acetelene cylinder, the box containing the tools which were all secured at the time. It was back up here on this platform like, which we later
78 dusted for prints, and it contained I think a thirty-eight caliber revolver and holster.

Q. Was anything—Does that picture represent a true picture of the way things were when you saw them first, Officer Viguirie? A. As near as I can remember it does.

Q. Will you step down off the platform? Is there anything in there that you can identify. Particularly I refer you to those two boxes right directly to your rear. A. The crowbars, a couple of crowbars in there, the gages were up there.

Q. Are you able to identify the oxygen tank? A. Yes, sir, on the rear of the tanks I have scratched my initials and the date.

Q. Did you have occasion to go to 930 Poydras Street that day? A. Later, yes, sir, the same day.

Q. For what purpose? A. We met other officers there.

Q. Did you find anything there? A. Quite a number of articles taken that belonged to Victor Linkletter. At the time I don't recall all of the articles.

Q. I show you specifically some paint. Are you able to identify any of these cans? A. When you asked me about the question on the 24th, we had seen this paint here on the 24th, on a Sunday. But later I went back here on this date, on the 25th, and got these cans of paint.

Q. You saw that there on the 24th? A. Yes, sir.

Q. What else did you see there? A. There was clothing, a lot of paper; I don't recall anything other than that.

Q. Do you know who lived there? A. Vic Linkletter and Ruth Morrison stated they lived there.

Q. You stated you went back there on the 25th? A. Yes, sir, I did.

79 Q. What did you do there on the 25th? A. That's when we took this can of paint from the residence.

Q. Is that all you took from the residence? A. That's all I remember. There may have several cans of paint taken.

Q. Did you go to 4516 Magazine Street? A. We did on the 25th.

Q. Did you take anything from 4516 Magazine Street? A. Yes, sir, we took some paint from there, green paint.

Q. Will you step down and look in that middle rear box and see if you are able to find the paint you recovered from 4516 Magazine Street? A. Yes, sir, this is the one. It has the initials and the date and the location.

Q. Is this the can that you found or saw on the 24th, that you picked up on the 25th at 930 Poydras Street? A. Yes, sir, it is. There would have been two of them.

Q. That would be S-17 and S-18 and I ask that they be marked for identification purposes only. The State asks that the can of paint removed from 4516 Magazine Street be marked fo ridentification purposes only S-19.

By Mr. Byrnes: May it please the court, I don't see the purpose of marking these cans of paint. It has already been testified to that the cans of paint had nothing to do with this case whatsoever.

By the Court: What is the purpose of your interrogation on the cans of paint from 930 Poydras Street and 4516 Magazine Street?

By Mr. Hertz: To show that Linkletter and Morrison resided at 930 Poydras Street. That Soldani, Morrison and Linkletter were in a business together at 4516 Magazine Street. That a screwdriver found at 719 Common Street matches the paint found at 4516 Magazine Street and 930 Poydras Street.

80 By the Court: If he can prove that, I'm not going to preclude it.

Examination resumed by Mr. Hertz:

Q. Did you ever see the defendant, Soldani, on or near the premises 719 Common Street? A. As I stated before, I saw the third man but I don't swear it was Soldani.

Q. The State asks again did you ever see the defendant, Soldani, on or about the premises 719 Common Street? A. As I said before, I can't state it was Soldani.

Q. Did you ascertain in your role of investigator, Officer, the operator of the business at the premises 4516 Magazine Street, specifically called the Novelty Shop?

By Mr. Braniff: We object to that as being hearsay?

By the Court: Objection Overruled.

A. It was understood . . .

By Mr. Braniff: I object to that.

Examination resumed by Mr. Hertz:

Q. Do you know who operated the business, the Novelty Shop, at 4516 Magazine Street? A. From what I learned from Linkletter . . .

Q. I am asking you, Officer, do you know of your own knowledge? A. No.

Q. Very well, then, that's the answer. Did you at anytime see the defendant, Soldani, at 4516 Magazine Street? A. No.

Q. What did you do if anything, to these cans of paint? A. After getting these cans of paint and marking them, we brought them to the State lab in Baton Rouge. The State Police Laboratory. Turned them over, got a receipt for them. Later we returned and got the cans and put them in

our evidence room. Later they were entered in our evidence book and brought to the property clerk.

81 Q. What color was the car the defendants LaCaze and Linkletter and the unidentified third man got out of? A. It was a faded dark blue Ford.

Q. I show you State Exhibits 15, 14, 16 and 13. Are you able to identify that. Take a look at the photographs, Officer, before I ask you any questions. A. Sure. This is the automobile that we saw there.

Q. What color is it? A. It is a faded blue Ford.

Q. Do you recall the license number of that car as you looked down on it? A. 249-277, Louisiana '58 plates.

Q. What is the license number of that automobile in the photograph? A. 249-277, Louisiana '58.

Q. Is that the same license number? A. Yes, sir, it is.

Q. I tender the witness.

Cross Examination

By Mr. Zeldon:

Q. Officer Viguirie, you stated OO you apparently were assigned to observe the entrance of 719 Common Street from a room in the St. Charles Hotel? A. Room 466, yes, sir.

Q. Who was with you? A. The first two nights was George Vogt; on Sunday it was Gerry Hirt, Captain Stevens and myself, later joined by numerous other officers.

Q. You were there on Friday and on Saturday night? A. I was only there from 7:00 at night until about 12:00 midnight.

Q. You stated Friday night a man and a woman, who you can't identify, came and tried the door? A. Yes, sir.

82 Q. Nobody else went in or out of the place? A. No, sir.

Q. Positive? A. Not that I saw.

Q. Saturday night nobody went in or out of that place? A. No, sir.

Q. Have you been in the building 719 Common Street? A. Yes, sir.

Q. How tall is that building? How many floors? A. It's two or three floors.

Q. You don't know? A. Well, there would probably be two floors. A basement, a first floor and an uppermost floor. I would call it the second floor.

Q. Is there any business on the first floor? A. No, sir, as you go into 719 Common, it's only a staircase. You go up the stairs and there's a whole floor.

Q. What's on that floor? A. Nothing; it's a vacant building.

Q. What about the second floor? A. Nothing up there.

Q. What about the third floor? A. There's a ground floor.

Q. Nothing in the whole building? A. No, sir.

Q. It's vacant? A. Yes, sir.

Q. Is there an elevator? A. No, sir, stairs.

Q. You then stated on Sunday, somewhere between 2:00 and 2:10 you saw Jake LaCaze and Linkletter take some objects out of the trunk and walk into the building? A. Yes, sir.

83 Q. Could you see what they carried? A. Saw two objects wrapped in sacks, several boxes.

Q. You don't know what it was? A. No, sir.

Q. You can identify it? A. No, sir.

Q. You were on the fourth floor. With respect to 719 Common Street, where were you? A. Directly in front of me.

Q. You said they stayed in there an hour and came out? A. I say approximately.

Q. A third man drove off? A. The third party came to the automobile, got in the automobile and drove off.

Q. You don't know who that was? A. No, I couldn't be positive.

Q. You then got instructions to arrest them? A. When Jake and them came out of the building.

Q. Where did they go when they came out? A. They walked on Common towards St. Charles. When they hit St. Charles, they turned left and walked towards Canal Street.

Q. On the lake side of St. Charles? A. Yes, sir.

Q. Just the two of them? A. Yes, sir.

Q. You were there? A. Yes, sir.

Q. Participated in the arrest? A. Yes, sir.

Q. Alone? A. No, sir?

Q. Were they armed? A. No, sir.

Q. Did they give you any resistance? A. No.

84 Q. You then took them back to 719 Common Street? A. We took them to in front of the St. Charles Hotel; first we put them in the car. Then from the car we drove back to 719 Common Street and went up.

Q. Then you took them back out and booked them? A. Yes, sir.

Q. Did you book them? A. No, sir, Captain Stevens.

Q. What were they booked with? A. Probably 107, investigation of burglary of Kolb's Restaurant.

Q. Stevens booked them. Is that what you just said? A. I think it was Captain Stevens. Captain Stevens would have been the senior officer and I think that's how they were booked.

Q. You booked at that time just the two of them, LaCaze and Linkletter? A. Yes, sir.

Q. You said that S-6 represents to the best of your recollection a true picture of what was on that platform when you walked in with the other arresting officers, is that correct? A. I would say this is just about it. If I'm not mistaken this box may have been moved. When I got there, after we called for a photographer, the photographer took these pictures, after taking the pictures, the Bureau of Identification went all over for evidence of fingerprints.

Q. Did they find any ? A. Not that I know of. As he got through with this stuff, I carried the tanks and put them on the side.

Q. Is that the way the tanks appeared? A. Yes, sir, wrapped up in burlap.

Q. Is this paint here the paint that you are talking about? Is that the same paint? A. I didn't take any paint. This paint was in 719 Common. The paint I took was out of Linkletter's house.

85 Q. What happend to this paint? A. Probably still there. I say probably, I don't know,

Q. Was any green paint here? A. Not to my recollection. I saw red paint.

Q. Look at everyone of these cans of paint. Did you see what color they were? A. Not every one; only one I saw was red.

Q. Could you testify under oath there wasn't any green paint there? A. I went through these and I don't recall seeing any green paint, no sir.

Q. You identified the various articles that you saw and I think you said that you marked a lot of them, is that right? A. Yes, sir. I did.

Q. Can you identify this or have you up to this time? A. No.

Q. Ever see that before? A. Yes, sir.

Q. Did you take it? A. No, sir, I didn't. I didn't handle all of the evidence. I had instructions to take the crowbars, burning equipment.

Q. Did you handle the crowbars? A. Yes, sir.

Q. Took those? A. Yes, sir, I did.

Q. Tell me where you marked it? A. Yes, sir, it's initialed L.V., Lawrence Viguirie.

Q. How did you identify the containers? A. On the back of the tank is L.J.V. with the dates on them.

Q. Did you mark this for identification, referring to a screwdriver? A. No, sir.

Q. Ever see that before? A. I saw it, yes, sir.

86 Q. Ever see it at 719 Common Street? A. It came from 719 Common Street.

Q. Where? A. In one of the boxes or in Major McNamara's hands, I don't remember.

Q. At 719 Common Street or on Poydras Street? A. I think I saw it at Poydras Street, I believe. Unless I have any mark on it, I'm not going to say positively.

Q. To your knowledge no prints were recovered? A. I don't think there were any prints at all, sir. There was some more evidence that I don't see there. There were four pairs of gloves. I don't see the gloves there.

Q. Were you there when they brought Linkletter and LaCaze back from being arrested on St. Charles near Canal Street? You participated in the arrest personally? A. Yes, sir Paul Gustafson and myself.

Q. After you arrested them, you brought them to the St. Charles Hotel. Your car was there? A. Yes, sir, by the St. Charles.

Q. Then you drove to 719 Common Street. How far a distance was that? A. Only about a half a block.

Q. You took them out of the car and walked up to 719 Common? A. I left them in the automobile there.

Q. What did you do? A. I went back to Room 466. While I was going to Room 466, I met the other officers coming down.

Q. Where were the two prisonrs? A. In the car with Paul Gustafson and another officer.

Q. When you originally went to 719 Common Street, were you there? A. I went with them.

Q. Who opened the door? A. At 719 Common? I don't know. The door was open when we got there.

87 Q. Do you know who opened it? A. No, sir.

Q. Then you went upstairs with the prisoners, is that right? A. Yes, sir.

Q. And all this paraphernalia was on this platform as portrayed in this photograph? A. Yes, sir.

Q. Now, all of this equipment was taken by the officers and taken back to the Detective's office here in the building, is that right? A. I imagine it would have been, yes, sir.

Q. What did you take? A. The burning equipment.

Q. The burning equipment. The tanks, acetelene and so forth? A. The stuff I have initialed, yes, sir.

Q. You didn't take this? A. The brief case? I was up there when the briefcase was found. May I see that picture, sir? When it was found it was right over here near. We didn't touch any of the equipment. Captain Becker opened this briefcase and we found three guns, no, two guns in the briefcase.

Q. All in the briefcase? A. No, one was in a brown paper bag. After it was dusted, I think John, Detective John Meredith, and myself handled the briefcase, the guns and like I said, the burning equipment.

Q. These guns were in the briefcase? A. Those two and a .38 revolver and a holster was in the brown paper bag.

Q. Where was it found ? A. Up here in this vicinity.

Q. Who carried the ladders back to headquarters. A. I don't recall. I think John Meredith and I carried the guns and the burning equipment.

Q. As to this other material, you have no knowl-

88 edge as to how it got there? A. I don't recall that, no, sir.

Q. That was the extent of your participation in this whole matter, just what you testified to? A. Well, until the car was located, the blue Ford was located several days later, we went over the car, dusted it, took photographs of it and scrappings off of the bumper of the automobile.

Q. And what did you find, if anything? A. Took photographs of the back of the Ford, found there was yellow markings on the back of the trunk, took colored photographs of the markings, also found yellow paint in the back of the trunk of the car that was also brought to the State Laboratory.

Q. Yellow paint. I have no further questions.

Cross Examination by Mr. Byrnes:

Q. How long did it take you from the time you arrested Linkletter and LaCaze to the time that you brought them to 719 Common Street? A. Mr. Byrnes, I would have to guess it. It was on a Sunday; it was raining. We had to call for a photographer. The photographer was out on a job. Possibly for two hours.

Q. Two hours? A. I'm guessing; I can't say exactly what time.

Q. How long had it been raining? A. All morning.

Q. And this occurred around what time? A. You say this occurred . . .

Q. When you saw them leaving the place and made the arrest. A. I would say 3:00 or 3:30.

Q. Was it still raining? A. Drizzling, Yes, sir, I remember I had a rain coat on.

Q. It had been raining all that day? A. Yes, sir.

89 Q. Where was the arrest made? A. Right on the corner of St. Charles and Canal Street by Stover's Candy Store.

Q. That's the uptown lake corner? A. Yes, sir.

Q. And then you brought them to your squad car? A. It wasn't my squad car; brought them to a squad car.

Q. Who was in the car? A. I don't think there was anyone in the squad car. We had men stashed all around the neighborhood and it was the closest one.

Q. Who stayed with them? A. Paul Gustafson stayed with them and like I said, when we hit the corner there was officers all over the place.

Q. You went in and made phone calls? A. Only thing I called for was the photographer. I knew we would need the photographer. By the time I called, most of the fellows already headed over to 719 Common.

Q. From the time you made the arrest, put them in the car and made this call and brought them to 719 Common Street, it was approximately two hours, as a guess? A. Yes, sir.

Q. Officer, getting back to the screwdriver, you said there was no markings on there at all? A. I don't see any, no, sir.

Q. There is no identification tag as to where that particular screwdriver was found, is that correct? A. There's markings on here. This is initialed, if you can see it.

Q. What's that initial? A. It's probably John Becker. No, it looks to be K.B. to me, sir.

Q. Do you know whether or not that is police identification? A. We have no specific way of marking, sir.

Q. You don't know of your personal knowledge where that was found, do you? A. No, sir.

Q. As far as you are concerned, it could have been at 930 Poydras Street, it could have been at Magazine Street or it could have been in this place on Common Street? A. Yes, sir.

Q. Now, when you saw the two men going into 719 Common Street on the 24th of August, did they have gloves on? A. No, sir.

Q. No gloves? A. No.

Q. That's all I have.

Cross Examination by Mr. Braniff:

Q. Officer, how did you determine that was green paint in one can and red paint in another? A. How did I tell it was green paint in one can and red in another?

Q. Yes. A. I think it's all green paint that I got. I didn't get any red paint.

Q. Did you use that screwdriver to open the can? A. No, sir.

Q. Well, how did you know it was green paint? A. Just from the outside of the can. At no time did I open that paint. We had enough paint on the outside to run the tests that we needed.

Q. You did testify that you had one can of red paint. A. I think the question came up, Mr. Zeldon asked me about the paint in this particular photograph here, S-6. There is any number of cans of paint up there and he asked whether there was any green paint up there. I went over most of that paint and the only paint I recall, I remember a technicolor red and several other colors of red and green. We even looked for green paint up there.

By Mr. Zeldon:

Q. Why did you look for green paint later if you
91 didn't look for it at the time you picked them up?
A. Something came up later in our investigation.
Q. In this investigation? A. No, sir.
Q. The green paint has nothing to do with this investigation at all? A. To my knowledge, I would say no.
Q. What is that screwdriver doing here? A. I don't know.

Re-Direct Examination

By Mr. Hertz:

Q. When you said that third floor was vacant, what do you mean?
Do you mean that none of this stuff was up there? A. When I said it was vacant I meant there was no furnishings in there.
Q. You testified you don't know whether that screwdriver was there or not? A. I don't recall.
Q. Did you submit the scrappings from these paint cans which you acquired at the Novelty Shop and 930 Poydras Street for some tests? A. Yes, sir.
Q. Did you get a report back? A. Yes, sir.
Q. Do you have it with you? A. No, sir.
Q. Do you know where it is? A. I think Major McNamara would have it.
Q. Do you know what that report disclosed?
By Mr. Zeldon: We object. It's hearsay evidence.

By Mr. Hertz:

Q. How about the report of the scrappings of yellow paint from the trunk of the car. Was that submitted
92 likewise? A. Yes, sir, it was.

Q. Were you present when this photograph was taken? A. Yes, sir, I was.

Q. Was anything touched on that scene before it was photographed, to your knowledge? A. Not to my knowledge. It was dusted for fingerprints and nobody went into the automobile or touched it.

Q. That is a picture of the car you saw downstairs? A. Yes, sir.

Q. If your Honor please, in connection with the testimony of this witness, the State would like to offer and introduce in evidence the ladders and ask that it be marked S-19; the briefcase containing two revolvers and ask that it be marked S-21, the yellow acetelene or oxygen tank and ask that it be offered as S-22, the cutting equipment and crowbars wrapped in burlap and ask that it be marked S-24, the gages and hoses and ask that it be marked S-25, a paper sack containing a revolver and cartridges and holster and ask that it be marked S-26.

Officer, I show you some gloves, are you able to identify these? A. On the box here is the date and my initials.

Q. Where did you first see these? A. That was at 719, upstairs.

Q. I ask that this be marked S-26 and ask that it be offered and introduced into evidence at this time.

By Mr. Zeldon: If the Court pleases, we are going to make a general objection to the admission of all of these documents or material or whatever the case may be on the specific ground that first they haven't proved the ownership of any of these things insofar as any of the defendants are concerned. They haven't proved that they were in the possession of any of the defendants. They have even attempted to introduce testimony here about articles that didn't come from 719 Common Street. We definitely object on those grounds.

93 By the Court: Objection overruled; I will admit it in evidence.

Examination Resumed

By Mr. Hertz:

Q. Officer, did you check the ownership of any of the pistols or registration of any of the pistols which were recovered? A. Yes, I did.

Q. Which one? A. On all three.

Q. Did you ascertain the registration or ownership? A. I sent telegrams to the Colt Firearm Company and the Smith and Wesson Firearm Company and through some ten to fifteen telegrams . . .

By Mr. Zeldon: I object to anything he found unless he can produce better evidence.

By the Court: I don't think that this witness can say he sent a telegram to the Colt Firearm Company and in response to his telegram he got so and so. I say this is hearsay evidence.

Examination Resumed

By Mr. Hertz:

Q. Officer, will you just answer my questions and then we will decide whether or not you should elaborate further. Did you find out to whom, if anyone, either or all of these three revolvers belonged to or was registered to?

By Mr. Zeldon: I object. It will be hearsay testimony.

By the Court: Objection overruled at this particular time. I instruct you to answer the questions yes or no.

A. Yes, sir, I did.

Examination Resumed

By Mr. Hertz:

Q. To whom is any or all of these revolvers registered?

By Mr. Zeldon: I object again. From his previous testimony the only way he could have ascertained that is by hearsay testimony.

By Mr. Hertz: I withdraw the question. To
94 whom were each or all of the revolvers registered.

By Mr. Braniff: We object on the ground that they didn't lay the proper predicate.

By Mr. Hertz:

Q. How did you ascertain the ownership or registration of the revolvers? A. I went to the Bureau of Identification myself, in the gun shop. I got a certified—no, I took a certified copy and I also got the original copy of the gun permit issued to Jake LaCaze to purchase this particular gun.

Q. Which particular gun? A. The .38 Colt.
Q. Will you step down and find the .38 Colt for me?
By Mr. Shea: We object on the same grounds as before if this is the only way he can show ownership.

By Mr. Hertz:

Q. Did you procure the original document of registration of this gun?
By Mr. Shea: Same objection, Your Honor.
By Mr. Zeldon: He is testifying to an objection taken your Honor.
By Mr. Braniff: They haven't laid the predicate yet.
By the Court: Objection sustained.

By Mr. Hertz:

Q. Did you question any of these men as to the ownership of that particular gun? A. I did.
Q. Did they inform you as to who owned the gun? A. No, they didn't.
95 Q. They did not? A. They denied ownership of the guns.

By Mr. Zeldon:

Q. Or knowledge thereof? A. Yes, sir.
By Mr. Hertz: I have no further questions,
By Mr. Zeldon: No questions, if the Court pleases.

* * * * * * * * * *

CERTIFICATION

I, PATRICIA CHAMPAGNE, Official Court Reporter of Section "H", Criminal District Court in and for the Parish of Orleans, State of Louisiana, do hereby certify that as such reporter I reported in shorthand the testimony adduced and proceedings had on the preliminary hearing held on October 10th, 1958, and on October 14th, 1958, in the case of the State of Louisiana verses Victor Linkletter, Et al, No. 161-357, and that the foregoing transcript consisting of pages one (1) through twenty-four (24) inclusive, contain a full, true and correct transcript of all of the testimony of the State witness Lawrence Viguirie.

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* * * * * * * * * * *

The following is a list of all of the State witnesses, duly sworn, who testified at the preliminary hearing in the case of State of Louisiana vs. Victor Linkletter, Et al, No. 161-357, on October 10th, 1958, and on October 14th, 1958:

John A. Harris
Major William McNamara
Oren Hymel
Detective John Meredith
Officer Ralph Fink
Charles Brecka
Eugene Tanguis
Officer Gerald Hirt
Officer Lawrence Viguirie
Officer Louis Fernandez

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96 **Appendage "C" to Petitioner's Brief, etc.**

DEPARTMENT OF POLICE
2700 TULANE AVENUE
NEW ORLEANS, LA.

Dear :

The records of this department reflect the following information:

Name Victor Linkletter Race W Sex M Date of Birth 9-21-20
NOPD# 59776 Date of Arrest 9-12-58
Charge: RS 14:62 relative to Simple burglary of 134 Carondelet St.

For: Joseph I. Giarrusso, Superintendent
Superintendent of Police
By: THOMAS G. GREGCON
Commanding Officer
Bureau of Identification

97 (Do Not Detach)

Inmate's Name Victor Linkletter No. 53289 Quarters Pine-3

LETTER—Regular (2 each week) ———— Writing to: 1st District Police Station Special Purpose X Relationship: Business

Please pay postage from my account . . .

. . . . . .

CORRESPONDENCE REGULATIONS—LOUISIANA STATE PENITENTIARY

RULES:

1. All letters must be legible and in English (unless permission is obtained for correspondence in foreign language.)

2. Do not send packages without referring to mailing list to determine what items inmate may receive.

3. Letters must be addressed to inmate correctly. Giving his name (name he is using in prison), P.M.B. and living quarters, if known.

Example:

John Doe
P.M.B. 70482—Pine 4
Angola, Louisiana

4. Cash money should not be enclosed in letter, only check or money order should be sent.

Inmate's Name Victor Linkletter PMB No. 53289 Quarters Pine-3 Date 1/23/62

Precinct Captain
1st District Police Station
North Rampart and St. Louis Sts.
New Orleans, Louisiana

Dear Sir:

I had recently filed writs in the Louisiana Supreme Court and the Court requested that I obtain supporting documents in connection with the writs.

In accordance, I hereby apply for a certified copy of the booking, showing the offense with which I was charged as entered on your book on the following dates:

August 24, 1958 and, on or about,
September 18, 1958.

I understand under Louisiana Law (acts 1928, No. 20 Sec. 2.) and R.S. 15:640, that I may request the copy as asked for.

I am pursuing this action under the Pauper's Oath and would appreciate your sending me this certified copy without cost.

Sincerely yours,

VICTOR LINKLETTER
Victor Linkletter
53289 Pine-3
Angola, Louisiana

(Use Both Sides of Paper. Do Not Write Between Lines.)

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98 CORRESPONDENCE REGULATIONS—LOUISIANA STATE PENITENTIARY

RULES:

1. All letters must be legible and in English (unless permission is obtained for correspondence in foreign Language.)

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Example:
John Doe
P.M.B. 70482—Pine 4
Angola, Louisiana

4. Cash money should not be enclosed in letter, only check or money order should be sent.

Inmate's Name Victor Linkletter PMB No. 53289 Quarters Pine 3 Date 10/24/62

United States District Court
Eastern District of Louisiana
Clerk's office
Baton Rouge 1, La.

Re. No. Miss. 648 State of Louisiana, ex rel Victor Linkletter

Honorable Sir:

In October 23, 1962, I rec'd. a copy of a Brief of Respondents On Motion to Dismiss.

I would like to also file a Brief in support of the Petition for a Writ of Habeas Corpus which is already filed with this Honorable Court. My reason for this request is that I have new evidence to submit to the Court which would show that the facts as presented by the respondents are mistaken facts and therefore I make this request. I would like to know how much time I would have to file such a Brief and request that I have at least 3 weeks to make up my Brief. Will you kindly advise me if this request is in order so that I may submit a Brief. Also, I would like to know if the Honorable Judge has appointed an attorney in my case.

Sincerely yours,

VICTOR LINKLETTER
53289 Pine 3
Angola, Louisiana

P.S. This request is made in good faith.

(Use Both Sides of Paper. Do Not Write Between Lines.)

99 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

No. 648—Miscellaneous

WEST, J.

STATE OF LOUISIANA, EX REL, VICTOR LINKLETTER, *Petitioner*

versus

VICTOR G. WALKER, *Warden*, Louisiana State Penitentiary, Angola, Louisiana, and THE STATE OF LOUISIANA
Defendants

Minute Entry of Order Granting Motion to Dismiss and Denying Application for Writ of Habeas Corpus—November 13, 1962

This matter came on for hearing on a former day on an order directed to respondents to show cause why a writ of habeas corpus should not issue as requested by petitioner, at which time respondents filed a motion to dismiss. Pursuant to order of Court, a copy of the transcript of the record of the original trial court was filed herein, together with a brief filed by respondents. Thereafter, a brief was filed herein by petitioner, after which the Court took time to consider.

Now, after thorough deliberation, and after considering the entire record of the original trial court proceedings, and the briefs filed herein by the respective parties:

IT IS ORDERED that the motion to dismiss filed by respondents be, and it is hereby GRANTED, and the petitioner's application for the issuance of a writ of habeas corpus be, and it is hereby DENIED.

REASONS

A thorough study of the record of the proceedings in the original trial court in this matter leads the Court
100 to the inescapable conclusion that the arresting officers had reasonable cause for arrest within the meaning of Louisiana Revised Statutes 15:60, and probable cause within the meaning of the Fourth Amendment of the United States Constitution. The record clearly in-

dicates that these officers had reasonable cause and probable cause to believe that petitioner had committed a felony, and hence, his arrest, without a warrant, was lawful. LSA Title 15:60; United States v. Lindsly, 7 F. 2d 247; McBride v. United States, 284 F. 416; O'Malley v. Whitaker, et al, 43 So. 545; Barfield v. Marron, 62 So. 2d 276; Johnson v. Hodges, 65 So. 2d 812; Carroll v. United States, 45 S. Ct. 280; Brinegar v. United States, 69 S. Ct. 1302.

As to the validity of the ensuing search and seizure, resulting in the procurement of evidence used at the trial of the case, there can be no doubt. Where the arrest is lawful, subsequent search and seizure incident to the arrest is likewise valid. Draper v. United States, 79 S. Ct. 233; United States v. Rabinowitz, 70 S. Ct. 430; Agnello v. United States, 46 S. Ct. 4. Since the holding in Mapp v. Ohio, 81 S. Ct. 1684, in no way changed these well established rules pertaining to the reasonableness of searches and seizures, that case has no application in the present situation. The remaining contentions of petitioner direct themselves solely to the question of his guilt or innocence, with which questions this Court may not concern itself in a habeas corpus proceeding. Voigt v. Webb, 47 F. Supp. 743; Evans v. Rives, 126 F. 2d 633; Jordan v. Clemmer, 80 F. Supp. 539.

E.S.W.

101 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

No. 648 Miscellaneous

UNITED STATES, EX REL., VICTOR LINKLETTER, *Petitioner*,

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA, and THE STATE OF LOUISIANA, *Defendants*.

Motion for Leave to Prosecute Appeal in Forma Pauperis and Order Allowing—November 27, 1962

(Omitted in printing)

(File endorsement omitted)

103 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

No. 648 Miscellaneous

UNITED STATES, EX REL., VICTOR LINKLETTER, *Petitioner*,

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA, and THE STATE OF LOUISIANA, *Defendants*.

Notice of Appeal to Circuit Court of Appeals Under Rule 73 (b)—Filed November 27, 1962

Notice is hereby given that Victor Linkletter, Petitioner above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of the United States District Court, Eastern District of Louisiana, Baton Rouge Division, denying a Writ of Habeas Corpus to Petitioner in No. 648 Miscellaneous, on November 13, 1962, holding that Petitioner failed to state a cause of action justifying the relief prayed.

This appeal is taken pursuant to 28 U.S. C.S. 1253 and U.S.C.A. 1915, and pursuant to Rule 75 (a), (b), (d), (f), (g), (h), (i), (m), (n) and (o), of the Federal Rules of Civil Procedure.

The following portion of the record is listed for transmission to the Clerk of Court, Fifth Circuit Court of Appeals.

1. Original Petition for a Writ of Habeas Corpus filed under docket No. 648 Miscellaneous.

2. Respondent's Motion and brief to support motion to dismiss Petitioner's application for Habeas Corpus.

3. Brief filed by Petitioner in support of Habeas Corpus application, including appendages (a), (b) and (c) attached thereto.

4. Transcript, or all Minute Entries held in this cause.

5. Findings and Judgment of Federal District Court.

6. Transcript of the record of the original trial court, case No. 161-524, Orleans Parish Criminal District Court, Section "E".

The following questions are to be presented by this appeal:

I

Petitioner avers that the judgment of the Honorable United States District Court, in granting the motion to dismiss petitioner's application for the issuance of a writ of habeas corpus is erroneous and that he has been aggrieved thereby.

104 In denying the relief requested by petitioner, this Honorable Court felt that the arresting officers had reasonable cause for arrest wtihin the meaning of Louisiana Revised Statutes 15:60, and probable cause within the meaning of the Fourth Amendment of the U. S. Constitution to believe that petitioner had committed a felony and that his arrest without warrant was lawful, and that a thorough study of the record of the proceedings in the original trial court in this matter led the Honorable Court

to reach the conclusion that the arrest of petitioner was legal as aforestated. Petitioner avers that this ruling of the Court with reference to the arrest of petitioner is particularly erroneous and contrary to the laws of this State and contrary to the Federal Constitutional Rights of Petitioner under due Process of Law, for the following reasons, to wit:

(a) The record of the trial Court which this Court made a study of was inadequate to show that petitioner was illegally arrested and it does not show clearly what had happened during the arrest of petitioner.

(b) The facts petitioner relied on to show that his arrest was illegal were clearly and fully set forth in his original petition for habeas corpus writ and further in his brief in support of his petition and the appendages attached thereto, i.e., appendage "A" and "C".

(c) In both petitioner's habeas corpus application and brief, the fact was brought out that petitioner had not been arrested for the crime of this cause until September 12, 1958 and that the records of the trial Court show that it was August 24, 1958, that petitioner was arrested, on or about which date all various searches and seizures were conducted by the police in this case.

(d) Along with the brief that petitioner had filed in support of his habas corpus application was appendage "C," which was an original letter that was mailed to petitioner from the New Orleans Police Department and this letter reflects that the correct date of arrest for the crime of this cause was September 12, 1958 and this is under N.O.P.D. No. 59776. This arrest was 19 days after the searches and seizures had taken place.

(e) There was no argument heard on the Federal Constitutional issue pertaining the alleged illegal arrest of petitioner, which he had supported by evidence from former Court proceedings (appendage "A") trial Court excerpts from the original trial court (Case No. 161-524, Section "E") and appendage "A" as

attached to petitioner's brief in support of his habeas corpus petition. Petitioner understands that (28 U. S. C. A., S. 2247) makes liberal provision for the use of records of former proceedings in evidence.

(f) Petitioner was deprived of a fair opportunity to establish his allegations pertaining to his contended illegal arrest. Petitioner deems that a hearing with witnesses in his presence was necessary in order to review the question of whether or not the arrest of Petitioner was legal and this was not done in the present case.

II

Petitioner avers that the court was in error by accepting an erroneous brief from the respondent's attorney of the record, and that by the court being confronted with such a document and by using such in adjudicating the merits of petitioner's application for a writ of habeas corpus, had deprived petitioner of a fair review concerning the actual circumstances surrounding the entire case at bar.

Petitioner had filed a brief in support of his habeas corpus application, in which the court was given certain evidence, such as portions of the original trial court excerpts and excerpts from other court proceedings etc., which petitioner deemed relevant to show that the brief of
105 the respondent had contained an erroneous "statement of facts", almost completely baseless, which contained fictitious factual allegations, which pertained to the arrest of petitioner. Petitioner had asked the Federal District Court to give the attorney for the respondent an opportunity to present a new brief as the facts in their brief were not true. The alleged facts in the respondent's brief give a false picture of the actual arrest of petitioner, if witnesses were to testify under oath, the true facts would be revealed, which petitioner contends would show that his arrest and all searches and seizures in this case were illegal.

Further, petitioner would show that the signature inscribed on the brief of respondent to dismiss petitioner's action is not the signature of the Louisiana Attorney General as the brief so indicates.

III

Petitioner avers the court was in error by not appointing counsel as he had originally requested. The appointment of counsel would have ensured fundamental fairness and given petitioner an opportunity to prove his allegations and since petitioner was not appointed counsel, it is deemed that he was deprived of a fair adjudication on his federal questions as contained in the original habeas corpus application filed in the federal court.

IV

Petitioner avers that the court was in error by assuming that the subsequent searches and seizures incident to the arrest for the crime of this cause was likewise valid. Petitioner contends that the said subsequent searches and seizures that the respondent speaks of, have never existed.

All searches and seizures had been conducted by the police about 19 days before his arrest for the crime of this cause. In support of these contentions, Petitioner submitted in his Habeas Corpus petition and brief, undisputed facts, which if examined, would show that there were *no frivolous* claims submitted to the court by petitioner.

The indisputable facts shown below exhibit a clear violation of the constitutional rights of Petitioner regarding "unreasonable" searches and seizures in violation of the 4th, 5th and 14th Amendments to the U. S. Constitution, which were all brought out in the allegations of the original petition filed in the Federal District Court and in a brief filed later in support of the habeas corpus petition.

1. Petitioner was not in the commission of any crime when arrested for the crime of this cause on September 12, 1958, or in the commission of any crime at the time of any other arrest concerning this case.

2. The searches and seizures were not incidental to a valid arrest in the instant case. The searches and seizures occurred August 24 and 25, 1958 and the arrest for the crime of this cause was on September 12, 1958.

3. The search of petitioner's person was on August 24, 1958, without arrest or search warrant and a set of

keys were seized and later used as evidence during the trial of this cause.

4. There were no stolen or contraband things seized by police during the entire case, or ever claimed to have been by anyone.

5. The officers had ample time and opportunity to obtain a search warrant for the several searches conducted by the police in this case, but did not do so.

6. In the instant case the several searches and seizures were not general, but instead, were exploratory for whatever might be turned up.

106 7. After five days detention in jail without warrant, starting August 24, 1958, the District Attorney would not accept the charge of this cause against petitioner as requested by the police. At this time the police had in their possession all things seized in the several searches and seizures, and it was later, on September 12, 1958 that petitioner was arrested and charged.

8. The trial record excerpts in the instant case would show that there was only money stolen in the amount of approximately $1,500.00 during a burglary. The several searches and seizures involved in this case failed to produce any stolen money. All money the police had seized from the person of petitioner and from his home had been returned to him during the week of August 24, 1958.

9. During the search of Petitioner's home on August 24 and 25, 1958, there were only personal papers and other personal things seized and were later used as evidence during the trial of this cause.

10. During the search of petitioner's business establishment, evidence was seized and oral testimony was given during the trial of this cause against petitioner and later on appeal, The Supreme Court of Louisiana rules that all evidence secured in connection with Petitioner's business establishment was a "Total lack of Evidence" and ordered the other person connected with petitioner to be discharged.

11. All searches and seizures in the instant case extended beyond the actual place of arrest, i.e., on the corner of St. Charles and Canal Street, New Orleans, Louisiana.

12. The officers conducting the search of the said business establishment read the company books without a physical seizure and used contents as oral evidence during trial of instant case.

13. The mode of obtaining evidence by police was unethical and a misdemeanor under the law of Louisiana.

14. The police seized and used as evidence, certain private papers valuable for evidential purposes only, i.e., from home of petitioner.

V

Petitioner avers that the court was in error by holding that Mapp v. Ohio, 81 S. Ct. 1684, "has no application in the present situation," since petitioner had accepted the burden and gathered together and submitted uncontradicted evidentiary facts which were all taken from official state records upon which petitioner based his allegations of denial of his constitutional rights, and the facts shown by petitioner were substantial and were never disputed by anyone, which facts petitioner deems show that his arrest was illegal and without reasonable or probable cause and all searches and seizures in the instant case were "unreasonable" searches and seizures in violation of the 4th, 5th and 14th Amendments to the United States Constitution.

VI

This appeal is filed in good faith and is true and correct to the best of petitioner's knowledge, information and belief.

Respectfully submitted,

/s/ VICTER LINKLETTER, *Petitioner*

107 VII

CERTIFICATE OF SERVICE

(Omitted in printing)

* * * * * * * * * * * *

Angola, Louisiana, November 19, 1962.

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109 (Clerk's Certificate to foregoing transcript omitted in printing.)

(File endorsement omitted)

110 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20235

UNITED STATES, EX REL, VICTOR LINKLETTER, *Appellant*,

v.

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana and THE STATE OF LOUISIANA, *Appellee*.

Appeal from the United States District Court for the Eastern District of Louisiana.

Order Denying Motion for Appointment of Counsel—Filed January 14, 1963

Before HUTCHESON, BROWN and WISDOM, Circuit Judges.

BY THE COURT:—

IT IS ORDERED that the motion of appellant for appointment of counsel on his appeal in the above entitled and numbered cause be, and the same is hereby DENIED because the case is not a criminal case but a habeas corpus on a state case.

111 **Minute Entry of Argument and Submission—May 16, 1963**

(Omitted in printing)

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112 IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20235

UNITED STATES, ex rel. VICTOR LINKLETTER, *Appellant*,

versus

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana, and THE STATE OF LOUISIANA, *Appellees.*

Appeal from the United States District Court for the Eastern District of Louisiana.

Opinion—September 12, 1963

Before TUTTLE, Chief Judge, and RIVES and MOORE,* Circuit Judges.

RIVES, Circuit Judge: This is an appeal from a denial of a writ of habeas corpus. On May 28, 1959, the petitioner, Victor Linkletter, was convicted in the criminal district court for the Parish of Orleans for the crime of
113 simple burglary. This judgment was affirmed by the Louisiana Supreme Court February 15, 1960, and rehearing was denied on March 21, 1960. Petitioner is presently serving a nine-year sentence at hard labor in the Louisiana State Penitentiary.

On December 8, 1961, after the decision in the case of *Mapp* v. *Ohio*, 1961, 367 U.S. 643, the Judicial District Court of the Parish of West Feliciana denied petitioner a writ of habeas corpus which was based on the same grounds as the present petition. An appeal of this ruling to the Louisiana Supreme Court was likewise unsuccessful and rehearing was denied. A petition for writ of certiorari

* Of the Second Circuit, sitting by designation.

was denied by the United States Supreme Court on June 18, 1962. *Linkletter* v. *Walker*, 1962, 370 U.S. 928. This petition for habeas corpus was filed in forma pauperis in the Eastern District of Louisiana on July 10, 1962. The State concedes exhaustion of state remedies.

The main questions presented by this appeal are whether certain evidence used against petitioner was obtained by unlawful search and seizure, and if so, whether *Mapp* v. *Ohio, supra*, applies retroactively so as to subject this conviction, obtained prior to *Mapp*, to collateral attack.

Although there is some dispute as to the facts of the case, even the State's version suffices to show an illegal search and seizure. On August 16, 1958, a bar in New Orleans was burglarized and investigation revealed that entry had been gained through a window or skylight on the third floor. Burglar tools were found at the scene of the crime. Thereafter, on August 24, New Orleans
114 police officers commenced a stakeout at the St. Charles Hotel, which commanded a view of the square, or block, in which the burglary had been committed. In the course of the surveillance, officers observed petitioner and another enter a building in this block. They were carrying two objects that appeared to be oxygen tanks. The building they entered afforded ready access to other buildings in the block. Petitioner was seen to open a window on the third floor of the building, climb out on the roof, and reenter the building. He was shirtless and was wearing a pair of gloves. Shortly thereafter, as the two men left the building, they were arrested.

The arresting officers took the two men back to the third floor of the building and on the roof found an assortment of burglar tools and three loaded pistols. Petitioner was also searched and a key to his apartment was uncovered. Thereupon, he was taken by the police officers to his home, six to seven blocks away, and further evidence was uncovered. On August 26, officers again went with petitioner to his apartment and in addition went to his place of business, where other evidence was seized.

Petitioner's arrest was made without a warrant; and the search of his person, at the time of his arrest, and the searches of his residence and place of business, were all made without a search warrant. All of the

above evidence was introduced against petitioner at his trial.

115 The district court held that the arresting officers had reasonable cause for arrest under Louisiana law and probable cause within the meaning of the Fourth Amendment. Thus the arrest without a warrant was held lawful. The court also held that "there can be no doubt" as to the validity of the ensuing search and seizure since where the arrest is lawful, subsequent search and seizure incident to arrest is likewise valid.

Even if it is assumed that the arrest was lawful, we cannot agree that the searchers of petitioner's apartment and place of business were incidental thereto. The right to search incident to arrest does not extend to places other than that of the arrest. *Agnello* v. *United States,* 1925, 269 U.S. 20, 30; *Silverthorne Lumber Co.* v. *United States,* 1920, 251 U.S. 385, 390; *Staples* v. *United States,* No. 20114, 5th Cir., July 10, 1963, m/s. In *Agnello* the defendant was arrested when he was in the home of another. While the defendant was being taken to the police station, other officers searched his home, which was several blocks distant from the place of arrest. The Court held this search to be unlawful. Applying that holding to the present case, the subsequent searches of petitioner's apartment and place of business without a warrant were likewise illegal.

At the time when the searches took place (August 1958) and when the petitioner's conviction became final (March 1960), the case of *Wolf* v. *Colorado,* 1949, 338 U.S. 25 was controlling. It had held that the Fourteenth Amendment did not impose upon the states the requirement that illegally seized property be excluded from evidence.

116 However, on June 19, 1961, the Supreme Court overruled *Wolf* in *Mapp* v. *Ohio, supra,* thus making the exclusionary rule a constitutional requirement under the Fourteenth Amendment. Since petitioner timely objected to the introduction of this evidence and since exhaustion of state remedies has been conceded, the case before us squarely presents the issue of whether the rule in *Mapp* applies in a collateral attack on a pre-*Mapp* conviction. We hold that it does not.

It has been said that questions relating to the retroactivity of opinions "are among the most difficult of those which have engaged the attention of courts, state

and federal." *Chicot County Drainage District* v. *Baxter State Bank*, 1940, 308 U.S. 371, 374. Indeed, the retroactivity of *Mapp* is not a simple problem. Note, 25 *Geo. B.J.* 238, 242 (1962). As one author has stated, "The problem is not one of discovering a wholly satisfying or wholly logical solution, for none exists." Bender, "The Retroactive Effect of an Overruling Constitutional Decision: *Mapp* v. *Ohio*," 110 U. *Pa. L.Rev.* 650, 679 (1962). Ultimately, the solution must come from the Supreme Court. In the meantime, however, it is the obligation of the lower courts to endeavor to reach an authoritative, logical and just result.

Before proceeding further, it is necessary that the terms "retroactive" and "prospective," as used in this opinion, be defined. A purely prospective opinion would be one
117 in which the new rule of law is limited to the future only and not even made applicable to the case before the court. See, generally, *Great Northern Railway* v. *Sunburst Oil & Refining Co.*, 1932, 287 U.S. 358. This is not the situation here, however, since the exclusionary rule in Mapp was applied to reverse Miss Mapp's conviction.[1] Also, the recent Supreme Court decision in *Ker* v. *California*, N. 53, Oct. Term 1962, decided June 10, 1963, m/s, applied *Mapp* where the seizure and trial were before the *Mapp* decision but the direct appeal was not until after *Mapp* was rendered.[2] Thus, we are only now concerned with whether or not *Mapp* applies to a conviction which had become final before that case had been decided, and we accordingly limit the terms "prospective" and "retroactive." This opinion does not deal with the availability of collateral attack on a post-*Mapp* conviction.

We must first reach the question of whether a holding of prospective application, as used in this case, would be constitutional. The Supreme Court in *Chicot County*

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1 It has been argued that a federal court cannot render a purely prospective decision because of the case and controversy requirement of the Constitution. See Note, 71 *Yale L.J.* 907, 930-933 (1962).

2 The search and seizure occurred in July 1960. The California District Court of Appeals affirmed the conviction on August 29, 1961, and rehearing was denied on October 25, 1961. 195 Cal. App. 2d 246, 15 Cal. Rptr. 767 (1961). *Mapp* was decided on June 19, 1961.

Drainage District v. *Baxter State Bank*, 1940, 308 U.S. 371, 374, said:

"The effect of the subsequent ruling as to invalidity [of an unconstitutional statute] may have to be con-
118 sidered in various aspects,—with respect to particular conduct, private and offical. Questions of rights claimed to have vested, of status, or prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statue and of its previous application, demand examination . . . . [I]t is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity [of statutes] cannot be justified."

And in *Great Northern Railway* v. *Sunburst Oil & Refining Co., supra*, the Supreme Court held that a *purely* prospective decision of the Montana Supreme Court, overruling an earlier determination by that court, was not unconstitutional. The Supreme Court, through Mr. Justice Cardozo, stated that such a diversion in time of the effects of a decision, whether sound or unsound, is not a denial of any federal constitutional right—the federal Constitution has no voice on the subject. He stated that "never has any doubt been expressed" that a court may so rule, whenever injustice or hardship will thereby be averted. 287 U.S. at 364.[3]

Thus constitutional, is there a philosophical barrier to the prospective overruling of a prior decision?[4] The
119 traditional Blackstonian view was that a court does not pronounce a new law, but maintains and expounds the old one; when a decision has been overruled, the first one was merely evidence of the law, which had turned out to be erroneous evidence. See Note, 71 *Yale L.J.* 907, 908 (1962). That is, a judge *finds* the law; he

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[3] Accord, *e.g.*, State v. Smith, 37 N.J. 481, 181 A. 2d 761, 762-65 (1962) (referring to *Mapp* case); see Note, 16 *Rutgers L. Rev.* 587, 588-91 (1962); *cf.* Safarik v. Udall, D.C. Cir. 1962, 304 F. 2d 944, 950.

[4] *Sunburst* also ruled that the choice of philosophical approach was not of constitutional concern. 287 U.S. at 365.

does not *make* it. This theory, when applied to the problems before us, inevitably leads to the following analyiss:

> "It must be recognized that, since Weeks and Wolf, there had been no change in the constitutional requirements of due process considered and found controlling in Mapp. If the protections are there now, were they not present when Wolf was decided and were they not present when Hall was tried, convicted and sentenced? An affirmative answer would appear to be inescapable."

Hall v. *Warden*, 4 Cir. 1963, 313 F. 2d 483, 495. But the more modern view, as espoused by Mr. Justice Cardozo and the other legal realists, is that judges exercise a law-creating function, although, of course, subject to the limitation of unreasonable "judicial legislation." See Note, 71 *Yale L.J.* 907, 911 (1962). We believe this is a more straightforward and realistic attitude than the
120 fiction of Blackstone.[5] It would hardly serve to quell the all too vociferous critics of the courts to

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[5] Our view closely aligns with that of Mr. Justice Cardozo. As he stated, "'The theory of the older writers [Coke, Hale and Blackstone] was that judges did not legislate at all. A pre-existing rule was there, imbedded, if concealed, in the body of the customary law. All that judges did, was to throw off the wrappings, and expose the statute to our view. *Since the days of Bentham and Austin, no one, it is believed, has accepted this theory without deduction or reserve, though even in modern decisions we find traces of its lingering influence.*'" Cardozo, The Nature of the Judicial Process, p. 124-5 (1921). (Emphasis added.)

"We must get away at one extreme from the notion that law is fixed and immutable, that the conclusion which the judge declares, instead of being itself a more or less tentative hypothesis, . . . has a genuine preexistence, that judgment is a process of discovery, and not in any degree a process of creation. This is the extreme of which Blackstone is the most eminent exponent. On the other hand, we must avoid the other extreme . . .—the conception of law as a series of isolated dooms . . . . Each extreme has a tendency, though for a different reason, to stifle the creative element." Cardozo, The Growth of Law 53-54 (1924).

To Cardozo the law was that body of principle and dogma which, with a reasonable measure of probability, may be used as the basis for judgment in pending or future controversies. Judges have the power to legislate, but not always the right. They have the right to legislate when there are gaps in

tell them that the court did not make the law, but merely found what had been there all along. Surely the above quote from page 374 of the *Chicot County* case, *supra*, bears out the conclusion that the Supreme Court has taken the more modern approach. See *Griffin* v. *Illinois*, 1956, 351 U.S. 12, 26 (concurring opinion of Frankfurter, J.); Note, 16 *Rutgers L.Rev.* 587, 590 (1962).

With these constitutional and philosophical barriers aside, we may now proceed to a determination of
121 the class of case into which the *Mapp* decision falls—prospective or retroactive. The first place to look, of course, is the *Mapp* opinion itself. It would seem that the very *least* that could be said is that the opinion is not clear as to whether it should be given retroactive effect.[6] It is our opinion that the decision in *Mapp* leaves the question open so that we may make our own determination as to retroactivity. *Accord, Gaitan* v. *United States*, 10 Cir. 1963, 317 F. 2d 494, 497; Traynor, "Mapp v. Ohio at Large in the Fifty States," 1962 *Duke L.J.* 319; Bender, *"The Retroactive Effect of an Overruling Constitutional Decision; Mapp* v. *Ohio,"* 110 *U.Pa. L. Rev.* 650, 671 (1962); Note, 25 *Geo. B.J.* 238 (1962); Note, 16 *Rutgers L. Rev.* 587, 595 (1962); *cf.* Note, 71 *Yale L.J.* 907, 937 n. 164 (1962). True, some authors have pointed to certain language which is supposed to hint at, or show an aware-

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the law, but even then, the judge "is not free to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles." Cardozo, The Nature of the Judicial Process, 141 (1921).

As to the location of the line of division between opinions which should be given retroactive effect and those which should be prospective only, Cardozo said: "I feel assured, however, that its location, wherever it shall be, will be governed, *not by metaphysical conceptions of the nature of judge-made law*, nor by the fetich of some implacable tenet, such as that of the division of governmental powers, but by considerations of *convenience*, of *utility*, and of the deepest sentiments of *justice*." Cardozo, The Nature of the Judicial Process, 148-49 (1921). (Emphasis added.)

[6] *E.g.*, Hall v. Warden, 4 Cir. 1963, 313 F. 2d 483, 494; United States *ex rel.* Gregory v. People, N.D. N.Y. 1961, 195 F. Supp. 527, 528; Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp* v. *Ohio*, 110 *U. Pa. L. Rev.* 650, 668 (1962); Note, 16 *Rutgers L. Rev.* 587, 588 (1962).

ness of, retroactivity.[7] They invariably rely on footnote nine of the majority opinion:

"9.

> As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note,
> 122 moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with *Burns* v. *Ohio*, 360 U.S. 252, *Griffin* v. *Illinois*, 351 U.S. 12, and *Herman* v. *Claudy*, 350 U.S. 116. In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties." 367 U.S. at 659 n. 9.

Also frequently pointed to is the following language in Mr. Justice Harlan's dissent.

> "[T]he issue which is now being decided may well have untoward practical ramifications respecting state cases long since disposed of in reliance on *Wolf* . . . ." 367 U.S. at 676.

On the other hand, some courts have drawn implications of prospectivity out of the language in the opinion;[8] for instance, the use of such words as "then," "today," and "no longer." None of these arguments convinces us that the Court has made a conscious disposition of this issue.[9]

As yet, only a few lower court cases have reached the issue of *Mapp's* retroactivity. However, the Fourth

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[7] *E.g.*, Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf* in *Kurland*, 1961—*The Supreme Court Review* 1, 43-44 (1961); Morris, *The End of an Experiment in Federalism—A Note on Mapp* v. *Ohio*, 36 *Wash. L. Rev.* 407, 432 (1961); Redlich, *1961 Survey of New York Law—Constitutional Law*, 36 *N.Y.U.L.* Rev. 1417, 1423 (1961).

[8] *E.g.*, People v. Figueroa, 220 N.Y.S. 2d 131 (Kings Cty. Ct. 1961); Hall v. Warden, D. Md. 1962, 201 F. Supp. 639, rev'd 313 F. 2d 483 (4 Cir. 1963).

[9] "There is no reason not to consider it now, in a proper case. This ought to be done, if deep consideration is the proper basis for lasting judgment." Bender, *supra* note 5, at 671.

123 and Tenth Circuits have already come to contrary conclusions. In *Hall* v. *Warden*, 4 Cir. 1963, 313 F. 2d 483, the Fourth Circuit, en banc, held that *Mapp* does apply retroactively in a habeas corpus proceeding. The court pointed out that the intent of the Supreme Court is not clear from the opinion in *Mapp*. The court noted Mr. Justice Harlan's dissent and footnote nine of the majority opinion, but apparently did so only to refute the district court's finding of prospective intent. As already pointed out, the real crux of the *Hall* case seems to be a Blackstonian approach to the judicial process. It may be of some significance that Hall had been sentenced to death, for the court said:

> "Perhaps the District Court may have been somewhat reluctant to be the first to apply Mapp retroactively, but it appears now that unless it is so applied and Hall's case is the first to be decided on that ground, the decision—at least for him—will be the last." 313 F. 2d at 497.

In *Gaitan* v. *United States*, 10 Cir. 1963, 317 F. 2d 494, the Tenth Circuit held that *Mapp* was prospective. The question arose in a more complex manner than in the instant case or the *Hall* case. Gaitan had been convicted of a federal crime prior to both *Elkins* v. *United States*, 1960, 364 U.S. 206, and *Mapp* under the so-called "silver platter" doctrine. After the decision in *Elkins*, but before *Mapp*, he collaterally attacked the conviction by a proceeding under 28 U.S.C. §2255, claiming *Elkins* was retroactive. This was denied on the ground that *Elkins* involved
124 a rule of evidence only and could not be raised by means of collateral attack. After *Mapp*, Gaitan brought this section 2255 proceeding claiming *Mapp* retroactively made *Elkins* a constitutional ruling and that *Elkins* was retroactive. *Mapp* was held not to be retroactive. We agree with the *Gaitan* decision insofar as it rejects *Hall* and the Blackstonian approach: "The assertion that the later decisions [*Elkins* and *Mapp*] were always the law departs from reality . . . . On the one hand we have the idea that the latest interpretation of the Constitution is what the Constitution has always said and meant. On the other hand is the practical realization that the inter-

pretation of the Constitution changes and has changed from time to time." 317 F. 2d at 497-98. But we do not necessarily adopt all of the reasoning in the *Gaitan* case. For instance, we do not think that *Patterson* v. *Colorado*, 1907, U.S. 454, or *Sunal* v. *Large*, 1947, 332 U.S. 174, are relevant as to the retroactivity of *Mapp*. Those cases held that a conviction based on a nonconstitutional rule of law, which is later reversed, does not involve a lack of procedural due process and accordingly is not subject to collateral attack. Thus, even if the nonconstitutional rule applies retroactively, there is no post-conviction remedy because there has been no deprivation of any constitutional right. But if a constitutional decision, such as *Mapp*, applies retroactively, clearly there is a remedy for such a constitutional deprivation. Nor do we wish our holding to be as broad as *Gaitan* might be interpreted. A decision should be limited to prospective application only
125 where the rigid tests which we have set out *infra* are met.

We have found only one other federal district court to have ruled on the retroactivity of *Mapp*. The Northern District of California in *Hurst* v. *People*, 1962, 211 F.Supp. 387, 391, applies *Mapp* retroactively in a habeas corpus proceeding. The court relied on *Griffin* v. *Illinois*, 1956, 351 U.S. 12, and *Eskridge* v. *Washington*, 1958, 357 U.S. 214, which we discuss *infra*. The lower state courts in New York have consistently refused to apply *Mapp* retroactively in post-conviction proceedings. The first such holding was *People* v. *Figueroa*, 220 N.Y.S.2d 131 (Kings Cty. Ct. 1961), based on the language in *Mapp* and criticized in Redlich, "1961 Survey of New York Law—Constitutional Law," 36 *N.Y.U.L.Rev.* 1417, 1421-23 (1961). Pennsylvania has come to the same conclusion as New York, *Commonwealth ex rel. Stoner* v. *Myers*, Pa. Super.Ct. 1962, 185 A.2d 806; and an excellent concurring opinion by Judge Traynor indicates that California may do likewise. *In re Harris*, Cal. 1961, 366 P.2d 305, 306.[10]

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[10] A number of states have held that *Mapp* applies retroactively to cases on appeal when *Mapp* was decided. *E.g.*, Commonwealth v. Spofford, Mass. 1962, 180 N.E. 2d 673; State v. Smith, 1962, 181 A. 2d 761; People v. Loria, 1961, 179 N.E. 2d 478. As already indicated, Ker v. California, U.S. (1963), would seem to have settled that question.

The proper test for determining the retroactive effect which should be given to a decision has been well stated by a writer in the Yale Law Journal:

> "In deciding whether to give a new rule retroactive effect, a court to which the issue properly has been
> 126 presented first should attempt to identify the purpose of the new rule, next should determine whether on balance those purposes will be served by general retroactive application of the new rule, and finally should decide whether these purposes will be promoted by retroactive application of the new rule in the particular case before it."

Note, "Prospective Overruling and Retroactive Application in the Federal Courts," 71 *Yale L.J.* 907, 942 (1962). No determination should be made without giving careful consideration to the purposes of the new rule and to the equitable and effective operation of the legal system. Note, 71 *Yale L.J.* 907, 951 (1962); see Bender, *supra* note 5. Compare test suggested in Note, 16 *Rutgers L.Rev.* 587, 592 (1962).

The first step is to define the *newly created* rule. It is only the extent to which *Mapp* changed the existing law in which we are interested, for those matters which were already part of the law before *Mapp* apply to the petitioner through their own force and without the need of retroactive application. The only change brought about by the *Mapp* decision was that the exclusionary rule of *Weeks* v. *United States*, 1916, 232 U.S. 383, is now part of the Fourteenth Amendment. It is important to note that the right of privacy against unlawful search and seizure was already incorporated in the Fourteenth Amendment when *Mapp* was decided. The Court in *Wolf* v. *Colorado*, 1949, 338 U.S. 25, said:

> 127 "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause . . . . Accordingly, we have no hesitation in saying that were a State affirmatively

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> to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of *enforcing* such a basic right raise questions of a different order." (Emphasis added.) 338 U.S. at 27-28.

The Court in *Mapp* merely added the exclusionary rule to the right of privacy recognized in *Wolf*: "Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against such invasion of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise." *Mapp* v. *Ohio*, 367 U.S. at 660.

Once the exclusionary rule is separated from the basic right to privacy itself, it becomes clear that the purpose of the exclusionary rule is to enforce the right of privacy as a deterrent. *Mapp* explicity held this—

> "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of
> 128 the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' Elkins v. United States, supra, at 217." 367 U.S. at 656.

Thus the exclusionary rule's purpose of deterrence, unrelated in any way with actual guilt or the probative value of the evidence, has been recognized by the writers. See Traynor "Mapp v. Ohio at Large in the Fifty States," 1962 *Duke L.J.* 319, 320, 341; Bender, *supra*, note 5, at 660-61; Note, 71 *Yale L.J.* 907, 942 (1962); Note, 16 *Rutgers L.Rev.* 587, 593 (1962). It might be argued that, following Mr. Justice Black's concurring opinion, the reason for the exclusionary rule is to prevent unfairness at trial—the same unfairness involved in self-incrimination. This is based on Mr. Justice Black's theory that the Fourth Amendment must be considered along with the Fifth Amendment, which together produce the exclusionary rule in question. See *Boyd* v. *United States*, 1885, 116 U.S. 616. We reject such an argument. In the first place, the ma-

jority opinion does not rely on the Fifth Amendment or self-incrimination, nor did *Weeks*; and, in the second place, the exclusionary rule of the Fifth Amendment does not apply through the Fourteenth. *Adamson* v. *California*, 1947, 332 U.S. 46. The majority opinion did not mention *Adamson*, much less overrule it. See Bender, *supra* note 5 at 664-68; *cf. State* v. *Smith*, 37 N.J. 481, 181 A.2d 761 (1962); *Mapp* v. *Ohio*, 367 U.S. at 657.

129 It might be argued that since the majority opinion analogized evidence received in an unlawful search and seizure with a coerced confession, see 367 U.S. at 656-57, the Court was recognizing an inherent unfairness, rather than deterrence, as a reason for preventing the use of unlawfully seized evidence. *Cf. Mapp* v. *Ohio*, 367 U.S. at 683-85 (dissenting opinion). But it can effectively be argued that the purpose of excluding a coerced confession, even assuming it is reliable evidence, is likewise the deterrence of lawless police action. See Traynor, 1962 *Duke L.J.* at 325-26 n. 18.

The next step deals with whether the purpose of the rule will be served by retroactive application:

> "Would the release from prison of every person whose conviction was based on illegally seized evidence have any effect in deterring unconstitutional searches? Assuming a finding of some deterrent effect, would it be substantial enough to outweigh the undesirability of reversing the convictions of many assumedly guilty prisoners?"

Note, 71 *Yale L.J.* 907, 942 (1962). The deterrent effect of retroactively applying *Mapp* will be slight, if any. The prospect of having illegally seized evidence excluded from a particular trial will deter officers far more than the wholesale reversal of past convictions. Deterrence, itself, is a particularly prospective purpose. Bender, *supra* note 5, at 661-62. And on the other side of the scale, "to place at the disposition of the guilty an extraordinary

130 remedy designed to insure the protection of the innocent would be to invite needless disruption in the administration of justice." Traynor, 1962 *Duke L.J.* at 341; see Note, 16 *Rutgers L.Rev.* 587, 596 (1962). This prospect has likewise been of concern to Judge Friendly

of the Second Circuit, see Friendly, "Reactions of a Lawyer—Newly Become Judge," 71 *Yale L.J.* 218, 236 n. 105 (1962), for at the time *Mapp* was decided one-half of the states allowed illegally seized evidence to be introduced. 367 U.S. at 680. We conclude that whatever slight deterrent effect, if any, *Mapp* might have if applied retroactively is insufficient to warrant the release of all of these presumably guilty prisoners.[11]

Several courts have pointed to *Griffin* v. *Illinois*, 1956, 351 U.S. 12, which ruled that it was a violation of the Fourteenth Amendment to deprive a person because of his indigency of a free transcript of his criminal trial in order to perfect an appeal. *Hall* v. *Warden*, 313 F.2d at 495; *Hurst* v. *People*, 211 F.Supp. at 395. In his concurring opinion, Mr. Justice Frankfurter argued that *Griffin* should be applied prospectively only. 351 U.S. at 25-26. But in *Eskridge* v. *Washington*, 1958, 357 U.S. 214 (per curiam), *Griffin* was applied retroactively in a habeas corpus proceeding concerning a 1935 conviction.[12] How-
131 ever, applying the test we have set out, the distinction between *Mapp* and *Griffin* becomes clear. The rule in *Griffin* is to provide fairness in procedure, not the prospective objective of deterrence. See Bender, *supra* note 5, at 672-73. Also, *Griffin* was not an overruling decision. The lack of precedent for prospective overruling in procedural due process cases might well be explained by the fact that few such rules would be found to be prospective under the test we have outlined. Indeed, *Mapp* is an unusual case. *Cf.* Note, 16 *Rutgers L.Rev.* 587, 593 (1962).

Some will no doubt say that to apply *Mapp* in the future and not in the past is unfair and undemocratic. See Note, 25 *Geo. B.J.* 238, 241 (1962). But the time of trial or of conviction is frequently of great importance to a defendant

[11] It should be pointed out that this decision is not merely based on the great administrative burden which would be placed on the courts should *Mapp* be applied retroactively, for prisoners as well as tort claimants have a right to crowd court dockets. Instead, this decision is based on the fact that such litigation would fail to serve the purpose for which the right was created.

[12] Justices Harlan and Whittaker dissented. *Compare* Patterson v. Medberry, 1961, 368 U.S. 839 (Memorandum of Harlan, J., on denial of certiorari), *with* Norvell v. Illinois, 1963, 373 U.S. 420.

or litigant and is usually a reasonable ground for classification. It is true that it does not serve the purpose of deterrence to apply *Mapp* to a person whose appeal was pending at the time *Mapp* was decided. The reason for applying the rule is because if *Mapp* had not reached the Court first, these cases could as well have been the vehicle for overruling *Wolf*. See Bender, *supra* note 5, at 676-77. Their cases were not yet past history when *Mapp* was decided.

132 For the reasons stated herein, the district court's denial of the writ of habeas corpus is

AFFIRMED

TUTTLE, Chief Judge, DISSENTING:

With much deference to the views of my colleagues, I must dissent. I agree that the search in this case was illegal. I also agree that in deciding *Mapp* v. *Ohio, supra*, the Supreme Court did not give clear guidance to the trial or circuit courts which must now determine whether the relief afforded Mapp is to be made available to others in post-conviction proceedings where their trial and conviction had been finally disposed of before the *Mapp* decision. The choice that this Court has between giving retrospective as well as prospective effect to Mapp is a choice that has been made by two Courts of Appeal for different Circuits. The Tenth Circuit has held, in accordance with the decision of the majority here, that the Supreme Court, by implication, pointed the direction in prospective application only. See *Gaitan* v. *United States*, 317 F. 2d 494. The Fourth Circuit, by an en banc opinion,[1] held that Mapp must be applied retroactively, *Hall* v. *Warden, etc.*, 313 F. 2d 483.

Both Courts recognized that the exclusionary rule now adopted by the Supreme Court is one required by the Constitution itself. "The decision in Mapp scotched
133 all notion that only *evidentiary rules* were involved." *Hall* v. *Warden, Maryland Penitentiary, supra.* In this situation I must align myself with what the majority

[1] There were two dissents, but these dissents were based on differences between the members of the Court on the legality of the search itself. The dissenting judges did not reach the question of retroactive application.

opinion calls "the traditional Blackstonian view," which is "that a court does not pronounce a new law, but maintains and expounds the old one;" as contrasted with those who believe "that judges exercise a law creating function." I find myself fully in accord with the statement from *Hall* v. *Warden*,

> "It must be recognized that, since Weeks and Wolf, there had been no change in the constitutional requirements of due process considered and found controlling in Mapp. If the protections are there now, were they not present when Wolf was decided and were they not present when [Linkletter] was tried, convicted and sentenced? An affirmative answer would appear to be inescapable."

To me the most persuasive thought which leads me to conclude that the Supreme Court did not intend to restrict Mapp to prospective application is that it did not say so. As stated by the Court in the *Hall* case,

> "It is significant that the Supreme Court did not specifically declare the effect of its decision was to operate only in the future, as it might have done."

With every deference to the views of my colleagues, my best judgment is that it will not do so.

134 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1962

No. 20,235

D. C. Docket No. 648 Misc. B.R.Div.

UNITED STATES, EX REL. VICTOR LINKLETTER, *Appellant*,

v.

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana, and THE STATE OF LOUISIANA, *Appellees*.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, Chief Judge, and RIVES and MOORE*, Circuit Judges.

Judgment—September 12, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Tuttle, Chief Judge, Dissents"

September 12, 1963

Issued as Mandate: Nov. 21, 1963

* Of the Second Circuit, sitting by designation.

130

(File endorsement omitted)

135 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20235

UNITED STATES, EX REL. VICTOR LINKLETTER, *Appellant*,

v.

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana, and THE STATE OF LOUISIANA, *Appellees*.

Appellant's Motion for Re-Hearing—Filed September 27, 1963

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The petition of VICTOR LINKLETTER, petitioner and appellant in the above entitled and numbered cause, with respect, good cause appearing, represents;

1.

That by judgment of this Honorable Court, dated Thursday, September 12, 1963, the Court affirmed the Honorable United States District Court's denial to grant to Petitioner a writ of habeas corpus.

2.

Petitioner avers that the judgment of this Honorable Court in affirming the decision of the Lower Court is erroneous and that he has been aggrieved thereby; that said judgment is contrary to the Constitutional rights of your Petitioner under the 4th., 5th., and Due Process of Law of the 14th. Amendment's to the United States Constitution and that Petitioner desires to file herewith his application for re-hearing to the end that said judgment be reviewed all in accordance with the provisions of Rule 29 of this Court and with provisions afforded in behalf of poor persons in forma pauperis cases under Rule 24 of this Honorable Court.

136 3.

Petitioner avers that the denial to him by this Honorable Court of adjudication as to his contentions that he

was illegally arrested and that an "unreasonable" search and seizure was conducted by the police against the person of Petitioner is particularly erroneous and contrary to the Constitutional rights of Petitioner under the 4th. and 14th. Amendments to the Federal Constitution.

The case of Petitioner has only been partly adjudicated and therefore denies him due process of law. Certain evidence was seized from the pockets of Petitioner during the contended illegal arrest and was later used as evidence during the trial and your Petitioner was prejudiced thereby.

4.

Petitioner avers that he has been deprived of a fair opportunity to establish his allegations that he was illegally arrested and that an "unreasonable" search and seizure was made against his person. It is deemed that a hearing with witnesses in his presence was necessary in order to review the question: "As To Whether or Not His Arrest Was Based on Probable Cause Within the Meaning of the 4th. and 14th. Amendments". This Honorable Court on Page two (2) of their opinion said: "There are Some Disputes as to the Facts of the Case". Petitioner contends that *some* of these disputed facts pertain to his illegal arrest and the search of his person, which facts, if resolved by testimony, rather than merely by affidavits, would readily show that Petitioner's claim that he was illegally arrested would prove to be true and that the story as presented to the Court by the State would prove to be false.

5.

Petitioner had presented uncontradicted evidentiary facts in his writs and briefs, which facts were taken from Official Court records as proof that his arrest was illegal and violated his Constitutional rights. Petitioner contends that the burden should fall on the State to *show proof* that his arrest was based on probable cause. The Court records in the instant case do not show clearly what had happened during the arrest of Petitioner.

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6.

Petitioner here would clarify the State's contention that he was legally arrested for the crime of this cause.

Under date of August 24th., 1958, Petitioner was arrested on suspicion in order to investigate the charge for the crime of this cause. After five (5) days detention at the police station the District Attorney refused to accept any charges that were placed against Petitioner as a result of this August 24, 1958 arrest. However, at the end of the five (5) day detention at the police precinct, a new and different charge was placed against Petitioner and as to this new charge, as of this date nobody has ever been called up for trial, which charge is now over Five (5) years old. Under the New Orleans Police Department's No. 59776, the records of this department would reflect that Petitioner was not arrested for the crime of this cause until September 12, 1958.

The police officers that conducted this arrest were never at any time in Court as witnesses during the entire trial. The District Attorney during the trial passed off as the legal arrest, the one that occurred on August 24, 1958, which arrest was originally refused when presented to him.

For the reasons shown above and the reasons set forth in the habeas corpus petition and appeal brief of Petitioner it is contended that his arrest was without reasonable and probable cause and therefore in violation of his Constitutional rights under the 4th. and 14th. Amendments to the Federal Constitution.

7.

Petitioner fully realizes that this Honorable Court has fully considered his case pertaining to the matter of his contended illegal searches and seizures of his home and business establishment. And it is greatly appreciated that the members of the Court have written at length. But even for the lowest of its Citizens, this Honorable Court has always been quick to rectify any errors that have been made towards those that seek help. This Petitioner prays that now this Honorable Court in this same spirit will look again into the record and grant his application for writ of habeas corpus.

Petitioner here would like to bring to the attention of this Honorable Court the case, *Rochin* v. *People of California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, which case raised the same search-and-seizure question as the present case, however the U.S. Supreme Court avoided the question and never once mentioned the case *Wolf* v. *People of State of Colorado*, 338 U.S. 25, 27, 69 S. Ct. 1359, 1361, 93 L. Ed. 1782.

Rochin, supra, decided that the Due Process Clause of the Fourteenth Amendment does not leave States free in their prosecutions for crime.

In the present case Petitioner asks this Honorable Court to adjudicate his case as a whole, which would include all of his contentions pertaining to an illegal arrest and other contended illegal searches and seizures that were not taken into consideration by this Court.

It is the contention that the present case if adjudicated as a whole, would show that his conviction was secured by methods which offend elementary standards of justice, and here Petitioner wishes to invoke the protection of the Fourteenth Amendment.

WHEREFORE, Petitioner prays that this application for rehearing be granted and that in due course the judgment of the Lower Court be reversed and set aside and Petitioner's sentence and conviction be vitiated, or annuled.

Petitioner further prays for all such further relief as law, equity and the nature of the case will permit.

By: VICTOR LINKLETTER
Victor Linkletter
244 N. Oak Street
Opelousas, Louisiana
Petitioner and Appellant

(Certificate of Service omitted in printing)

(File endorsement omitted)

140 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20235

UNITED STATES, EX REL. VICTOR LINKLETTER, *Appellant*,

v.

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana, and THE STATE OF LOUISIANA, *Appellees*.

Appeal from the United States District Court for the Eastern District of Louisiana.

Order Denying Petition for Rehearing—October 29, 1963

Before TUTTLE, Chief Judge, and RIVES and MOORE*, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

CHIEF JUDGE TUTTLE DISSENTS.

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141 **Order Recalling and Staying Mandate—December 12, 1963**

(Omitted in printing)

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* Of the Second Circuit, sitting by designation.

142 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20235

UNITED STATES, EX REL., VICTOR LINKLETTER, *Appellant*,

v.

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana, and THE STATE OF LOUISIANA, *Appellees*.

Appeal from the United States District Court for the Eastern District of Louisiana

Order Appointing Counsel to Represent Appellant in the Supreme Court of the United States—December 12, 1963

On motion of the appellant, Victor Linkletter, "that he desires this Court to appoint or obtain counsel to represent him for the purpose of seeking further review of his case in the United States Supreme Court," IT IS ORDERED that the Honorable Truman M. Hobbs and Euel A. Screws, Jr., Attorneys at Law, 444 South Perry Street, Montgomery, Alabama, be and they are hereby appointed as attorneys to represent the said Victor Linkletter and to present to the Supreme Court of the United States a petition for writ of certiorari to review the final judgment and decision of this Court, and to represent the said Linkletter in such certiorari proceedings.

Enter for the Court this the 12th day of December 1963.

RICHARD T. RIVES
United States Circuit Judge

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143 **Order Transmitting Record on Appeal to the Supreme Court of the United States—Filed December 17, 1963**

(Omitted in printing)

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144 (Clerk's Certificate to foregoing transcript omitted in printing.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 999 Misc.

VICTOR LINKLETTER, *Petitioner*,

v.

VICTOR G. WALKER, *Warden*

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—Ma. 18, 1964

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1125 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆U. S. GOVERNMENT PRINTING OFFICE 1964—739335/P.O. 75